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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a criminal defendant, after conviction for criminal contempt for violating the terms of a family court protective order, may be tried, consistent with the Double Jeopardy Clause, as interpreted by *Grady v. Corbin*, 110 S. Ct. 2084 (1990), in a later prosecution for offenses arising out of the same criminal episode, where the prosecution intends to prove only part of the conduct that constituted the offense of criminal contempt?

2. Whether, in light of the substantial precedential, logical, and practical weakness of the framework for Double Jeopardy analysis set forth in *Grady v. Corbin*, 110 S. Ct. 2084 (1990), *Grady* should be overruled in favor of the test stated in *Blockburger v. United States*, 284 U.S. 299 (1932), subject to the exceptions delineated in *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Harris v. Oklahoma*, 433 U.S. 682 (1977)?

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Hawaii respectfully prays that a writ of certiorari issue to review the opinion, and judgment on appeal of the Supreme Court of the State of Hawaii entered in the above-entitled proceeding on May 8, and 20, 1991.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Hawaii dated May 8, 1991, which is not yet reported, is reprinted in Appendix ("App.") "A," *infra*. The Judgment

on Appeal dated May 20, 1991 is unreported and is reprinted in App. "F."

The Order of Dismissal of Counts I and II of the Complaint of the Circuit Court of the First Circuit, State of Hawaii, in *State v. Kipi*, Cr. No. 89-1647 (Haw. Cir. filed 1989), dated February 16, 1990 is unreported and is printed in App. "B."

The Circuit Court's oral ruling on the motion to dismiss (and the State's motion for reconsideration thereof) is set forth at Tr. at 5-9, Cr. No. 89-1647 (Haw. Cir. Feb. 15, 1990), which is reprinted at App. "C."; Pet. App. 23a-26a.

JURISDICTION

The opinion, and, for the purposes of this Court, the judgment, of the Supreme Court of the State of Hawaii was entered May 8, 1991. No petition for rehearing was filed. The time in which this Petition may be filed therefore extends to and includes August 6, 1991, and this Petition is timely. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> [No person shall be] subject for the same offence to be twice put in jeopardy of life or limb . . . .

Section 710-1077(1)(g) of the Hawaii Revised Statutes (Supp. 1989) provides that

> § 710-1077 Criminal contempt of court. (1) A person commits the offense of criminal contempt of court if:
>
> > (g) The person knowingly disobeys or resists the process, injunction, or other mandate of a court.

Section 708-810(1)(c) of the Hawaii Revised Statutes (1985) provides that

> § 708-810 Burglary in the first degree. (1) A person commits the offense of burglary in the first degree if he intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:
>
> > (c) He recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

Section 707-715(1) of the Hawaii Revised Statutes (1985) provides that

> § 707-715 Terroristic threatening, defined. A person commits the offense of terroristic threatening if he threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:
>
> > (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person.

Section 707-717 of the Hawaii Revised Statutes (1985) provides that

> § 707-717 Terroristic threatening in the second degree. (1) A person commits the offense of

terroristic threatening in the second degree if he commits terroristic threatening other than as provided in section 707-716 [which establishes additional factors required for *first* degree terroristic threatening].

STATEMENT OF THE CASE

Two terms ago, this Court, in *Grady v. Corbin*, 110 S. Ct. 2084 (1990), over the vigorous dissents of four Justices, sharply expanded the scope of Double Jeopardy protection for criminal defendants beyond the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932),[1] which had been thought, subject only to narrow exceptions not relevant here, to control Double Jeopardy analysis of multiple prosecutions for different crimes arising out of the same episode. Under *Grady*, subsequent prosecutions are barred if the State, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 110 S. Ct. at 2093, Even the *Grady* majority, however, restricted this reading of the Double Jeopardy clause to subsequent prosecutions in which the State intends to prove the *entire* conduct comprising *all elements* of the offense for which the defendant has already been convicted.

The issue in this case is whether the Hawaii Supreme Court improperly went *even further* than the *Grady*

[1] Under that test, a successive prosecution is not barred where "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

majority was willing to go, contradicting *Grady*'s express limitations, by barring a subsequent prosecution in which the State was to prove only *some, but not all* elements of the offense for which the defendant had previously been convicted. In addition, this case raises the further issue of whether, if *Grady* is construed expansively, despite its express limitations, to bar the prosecution in this case, the *Grady* doctrine will amount to a full adoption of the heretofore repudiated "same transaction" test and even contradict the exception explicitly recognized in *Grady* itself. This case raises precisely the very problems and inconsistencies within the *Grady* doctrine the dissenting Justices noted, and thereby presents an opportunity for this Court to reconsider whether *Grady* is good law.

1. In 1989, Linda Yamasaki, the ex-girlfriend of respondent Jonathan Kipi successfully petitioned the Family Court for the First Circuit, State of Hawaii, for a temporary restraining order against Kipi. On August 21, 1989, the family court, after a hearing, extended the protective order through February 17, 1990. Pet. App. 27a.

In that form order, the following box was checked:

> Petitioner [Yamasaki] and Respondent [Kipi] are mutually enjoined and restrained from contacting, threatening or abusing each other and anyone living with the other party (including but not limited to their home or place of employment) and maliciously damaging the property of the other party.

Pet. App. 28a. On October 11, 1989 at 4:00 a.m. Kipi, without permission, entered Yamasaki's residence while she was sleeping, and proceeded to threaten Yamasaki,

her then-boyfriend Sergio Chaulet, and David Harris, Yamasaki's housemate.

2. On October 12, 1989, Honolulu Police filed in the Family Court a petition against Kipi alleging he intentionally disobeyed the protective order and thereby committed the offense of Criminal Contempt of Court, in violation of HRS § 710-1077. App. "H." Kipi pleaded not guilty. Later, on October 24, 1989, a criminal complaint against Kipi was filed in the Circuit Court of the First Circuit, State of Hawaii, Hawaii's trial court of general jurisdiction, charging him with Burglary in the First Degree under § 708-810(1)(c), Haw. Rev. Stat., (count I) and Terroristic Threatening in the Second Degree under § 707-717(1), Haw. Rev. Stat., for the threats against Yamasaki, Chaulet and Harris (counts II, III and IV). *See* Pet. App. 41a-43a.

3. On December 7, 1989, Kipi moved in Family Court to change his plea to the criminal contempt charge to no contest. The State did not object and, in response to the Family Court's request for particular facts constituting the protective order violation, the prosecutor stated that:

> a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki, at her home on October 11, 1989, very early in the morning.
>
> b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the Defendant enter into her home.
>
> c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio [sic] Chaulet, and Ms. Rebecca Moore, all of whom reside with Ms. Yamasaki.

> d. At the time of the violation, the Defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio [sic] Chaulet, and Mr. David Harris.

See Pet. App. at 4a. The State has stipulated that the prosecutor knew of the pending burglary and terroristic threatening charges that had been filed in circuit court. On December 7, 1989, the family court accepted Kipi's plea and sentenced him to five months incarceration. *See* Pet. App. 30a-31a.

4. Jury selection began in circuit court on February 13, 1990 for the burglary and terroristic threatening charges. Before the jury was sworn, defense counsel orally moved to dismiss the entire complaint based on double jeopardy and § 701-109, Haw. Rev. Stat., the compulsory joinder rule.[2] The State filed a Memorandum in Opposition, disputing the basis for any Double Jeopardy bar, at the February 15, 1990 hearing on the motion. The circuit court orally, on February 15, *see* Pet. App. at 24a-26a, and in a written order of February 16, 1990, granted respondent's motion to dismiss counts I & II regarding Yamasaki, but denied the motion as to counts III & IV as to Chaulet and Harris. *See* App. "B."

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[2] § 701-109, Haw. Rev. Stat., provides in relevant part that:

> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

5. The State timely filed a Notice of Appeal of the dismissal of counts I & II.[3] The State argued on appeal, *inter alia*, that the Double Jeopardy Clause, as incorporated by the Fourteenth Amendment, did not bar the subsequent prosecution and specifically that *Grady v. Corbin* was inapplicable.[4]

The Hawaii Supreme Court, in its opinion of May 8, 1991, held that prosecution of each of the counts was not barred by § 701-109(2), Haw. Rev. Stat., because the contempt charge and the other charges (burglary, terroristic threatening) were not within the jurisdiction of a single court. Pet. App. 8a. The court went on to conclude, however, *see id.* 9a-16a, that prosecution of counts I through IV was barred by the Double Jeopardy Clause, as interpreted by this Court in *Grady v. Corbin*, 110 S. Ct. 2084 (1990). No independent and adequate state ground was stated in support of the decision of the Hawaii court. Pet. App. 1a-16a.

The Hawaii court, basing its decision on *Grady v. Corbin*'s ban against a subsequent prosecution "in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct

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[3] Trial on counts III and IV proceeded but the jury was unable to reach a decision and a mistrial was declared. On March 22, 1991, the circuit court issued an order staying proceedings on counts III and IV pending appeal of the order dismissing counts I & II.

[4] To see precisely how the State attacked the Double Jeopardy claim and *Grady*'s applicability before the Hawaii Supreme Court, see Pet. App. 34a-38a for excerpts of the briefs.

that constitutes an offense for which the defendant has already been prosecuted," 110 S. Ct. at 2084, stated that:

> The conduct that the State would use to prove those crimes [burglary, terroristic threatening] is the identical conduct that the family court considered when it accepted Kipi's no contest plea, and particularly when it sentenced him to five months incarceration based on the egregiousness of the contempt violation. Kipi's entering of Yamasaki's house and his threats to her and two of her housemates was the exact conduct that constituted the offense of contempt with respect to the family court's protective order.

Pet. App. 12a.

The Court therefore affirmed the dismissal of counts I and II of the complaint and remanded with instructions that the remaining counts (III & IV) be dismissed. Pet. App. 16a. The State of Hawaii now petitions to have all the counts reinstated.

REASONS FOR GRANTING THE WRIT

This case presents the important and recurring issue of the extent of double jeopardy protection from subsequent prosecutions for offenses arising out of a single episode. In *Grady v. Corbin*, 110 S. Ct. 2094 (1990), this Court, over the strong dissents of four Justices, vastly expanded the scope of double jeopardy protection beyond that provided by the well-understood *Blockburger* test (see *Blockburger v. United States*, 284 U.S. 299 (1932)) by prohibiting a subsequent prosecution "in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct

that constitutes an offense for which the defendant has already been prosecuted." 110 S. Ct. at 2084. The *Grady* majority, however, was careful to limit the scope of the bar to subsequent prosecutions in which the government would prove the *entire* conduct which constitutes *all elements* of the offense for which the defendant had previously been prosecuted. *See Grady*, 110 S. Ct. at 2092-2094 & n.11. The decision below flouts the entire rationale and structure of *Grady*, and for this reason alone, should be reviewed, and reversed. Controversial as the *Grady* rule is, there can be no reasoned claim that the Hawaii court kept within *Grady*'s own logic. That logic "must be followed" by the lower courts applying, as did the Supreme Court of Hawaii, the federal constitution, and should be enforced by this Court by granting the writ and either summarily reversing or setting the case down for plenary briefing and argument. *Compare, e.g., Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Indeed, while this case can well be decided on narrow grounds, the confusion underlying the Hawaii Supreme Court's opinion in this case only highlights the practical problems, and doctrinal weakness, of the *Grady* rule in a way that counsels granting the writ so that this Court may determine whether *Grady* should be reconsidered and overruled. The decision below exemplifies how easily the *Grady* analysis quickly shades into a bar on subsequent prosecutions where the government intends to prove *only some, but not all*, elements of the offense for which the defendant had been previously prosecuted, an understanding of the Double Jeopardy Clause that is equivalent to the long-rejected "same transaction" test, and which is at direct odds with the plain

language of the Clause, which prohibits only being placed in jeopardy twice for "the same *offense*." While, to be sure, this Court's authority to overrule one of its precedents should be exercised sparingly, this case presents an appropriate occasion for reconsideration of a controversial recent decision of this Court, which decides a question of constitutional law in a manner that makes correction by way of legislation " 'practically impossible.' " *Payne v. Tennessee*, 59 U.S.L.W. 4814, 4819 (U.S. June 27, 1991) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). For this additional reason, the Court should grant the writ in this case.

I. Review Should Be Granted Because The Decision of the Supreme Court of Hawaii Barring the Subsequent Prosecution of Respondent, even though the State will Not Prove the Entire Conduct which Constituted the Contempt Offense for which Respondent was Previously Convicted, Violates Even the Expansive Double Jeopardy Ruling in *Grady v. Corbin*.

The majority decision in *Grady* limited its expansive holding to bar only those subsequent prosecutions in which the government, to establish an essential element of an offense charged in that prosecution, will prove the *entire* conduct constituting *all the elements* of the offense for which he had already been prosecuted. *See Grady*, 110 S. Ct. at 2093 (prosecution barred where government will prove "conduct that constitutes an offense" already tried); *id.* at 2094 (prosecution barred because State will prove "entirety of the conduct for which Corbin was convicted"); *id.* at 2093 n.11 (In converse situation, where

the State in course of securing initial conviction necessarily has proved the conduct "comprising *all of the elements* of another offense" not yet prosecuted, the subsequent prosecution is barred).

Justice Scalia's dissent confirms this limitation:

> [The Court's ruling] means, presumably, that prosecutors who wish to use facts sufficient to prove one crime in order to establish guilt of another crime must bring both prosecutions simultaneously; but that those who wish to use only *some of* the facts establishing one crime – not enough facts to 'prove conduct that constitutes an offense' – can bring successive prosecutions.

110 S. Ct. at 2103 (Scalia, J., dissenting).

The criminal statutes and underlying facts in this case make plain that the Supreme Court of Hawaii completely unhinged the *Grady* rule from its own limits. For it is clear that the State would *not*, in proving the burglary and terroristic threatening charges, prove the entire conduct constituting all elements of the criminal contempt offense for which respondent Kipi was earlier convicted. As the Hawaii Supreme Court interpreted the Hawaii criminal statutes, in order to sustain the criminal contempt charge, the State "was required to prove that Kipi contacted, threatened, or abused Yamasaki or any of her housemates; that *Kipi knew he was ordered not to do so*; and that *he intentionally disobeyed the order.*" *See* Pet. App. 9a (emphasis added); HRS § 710-1077(1)(g).

To prove the burglary charge, however, the state would only have "to prove that Kipi intentionally entered Yamasaki's house in reckless disregard that it was

another's dwelling with the intent to commit a crime therein." Pet. App. 9a-10a; *see* HRS § 708-810(1)(c). The State, therefore, in its subsequent prosecution for burglary, would not need to prove that Kipi knew he was ordered not to contact Yamasaki or her housemates, or that he intentionally disobeyed the order, requirements of the criminal contempt conviction. Therefore, under the *Grady* majority's own express limitations, because the State in a subsequent prosecution for the burglary charge will *not* prove the entire conduct satisfying all the elements of the criminal contempt charge, the burglary prosecution is not barred by Double Jeopardy. The Hawaii Supreme Court's contrary ruling plainly conflicts with *Grady*. It should be reversed.

Similarly, to prove the terroristic threatening charges (counts II, III & IV), the State need only prove that Kipi "intentionally or recklessly threatened Yamasaki, Harris, and Chaulet." Pet. App. 10a; *see* HRS §§ 707-717 & 707-715(1). As in the case of the burglary charge, the State, to prove the terroristic threatening charge, will not prove that Kipi knew he was ordered not to threaten the victims or that he intentionally disobeyed the order. Because the State will therefore not prove all elements of the criminal contempt offense, the Hawaii Supreme Court's holding that the prosecution of the terroristic threatening charges is barred by *Grady* is plainly in error.[5]

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[5] Although the Supreme Court of Hawaii never reached *Grady's* corollary, namely, that "if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy

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The defects in the Supreme Court of Hawaii's analysis are sufficient to warrant the granting of certiorari, and, indeed, even sufficient to warrant summary reversal.[6] At the least the Court should grant the petition to

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Clause would bar subsequent prosecution of the component offense," 110 S. Ct. at 2093 n.11, the judgment could not be affirmed under this logic.

The State would clearly not have to establish in its criminal contempt case all of the elements of the burglary charge. Specifically, the State would not have to establish that Kipi entered Yamasaki's home "with intent to commit therein a crime." HRS § 708-810(1)(c); *see* Pet. App. 9a-10a. And based on the prosecutor's representations at the December 7, 1989 hearing when Kipi changed his plea, the State was not *in fact* going to establish that Kipi entered the home with intent to commit a crime therein. *See supra* pp. 6-7. The State was merely going to prove that Kipi entered Yamasaki's home, awakened her and her housemates, and threatened Yamasaki, Chaulet, and Harris. *Id.* In sum, the subsequent prosecution for burglary is also permissible under the corollary *Grady* test.

Likewise, the State would not have to prove, in its contempt case, that he made the threats "with the intent to terrorize, or in reckless disregard of the risk of terrorizing," a required element of the terroristic threatening charge. HRS § 707-715; *cf.* Pet. App. 10a. Therefore, subsequent prosecution of the terroristic threatening charges also survives the corollary *Grady* test.

[6] Because the Hawaii Supreme Court's decision effectively expanded the *Grady* doctrine to bar a subsequent prosecution in which the State will *not* prove the entire conduct satisfying *all* elements of the offense for which a defendant was convicted, but will only prove *some* of those elements, it nullifies the very example of a permissible subsequent prosecution given in the *Grady* decision itself.

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establish firmly the limits *Grady v. Corbin* set on its application to multiple prosecutions for different crimes arising out of a single transaction, and to prevent further erosion of prosecutorial discretion to bring separate prosecutions for different crimes in these situations.

II. Because this Case Highlights the Difficulties Inherent in the *Grady* Doctrine, Review Should be Granted to Allow this Court to Reassess Whether *Grady v. Corbin* Should Be Limited or Overruled.

Although the foregoing demonstrates that this case could be decided on narrow grounds simply applying the limits which the *Grady* majority itself adopted to cabin

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The *Grady* majority specifically noted that their holding would *not* bar a subsequent prosecution of the reckless and/or negligent homicide and assault charges in *Grady* itself if the State were to establish the defendant's recklessness or negligence by proving only that defendant was speeding (an offense for which he was never prosecuted), and not by proving driving while intoxicated or failing to keep right, the offenses for which he had already been convicted. *Grady*, 110 S. Ct. at 2094. But under the expanded *Grady* doctrine applied by the Hawaii Supreme Court, in which a subsequent prosecution is barred whenever the state will prove any fact that also establishes any element of a prior prosecution, even the above prosecution would be barred. That is because New York would certainly prove in the homicide/assault prosecution that Corbin was the driver of the vehicle, a fact that also establishes the identity element of the first prosecution. In other words, the speeding exception recognized in *Grady* is dependent upon the narrow construction given in *Grady* that bars only those subsequent prosecutions in which the state will prove conduct that constitutes *all elements* of the offense for which the defendant had previously been tried.

the *Grady* analytic, the difficulties in applying the *Grady* rule, as shown by the result in this case, present the circumstances which warrant this Court's reexamination of the underpinnings of *Grady* itself.

As state in *Payne v. Tennessee*, 59 U.S.L.W. 4814 (U.S. June 27, 1991):

> *Stare decisis* is the preferred course because it promotes evenhanded, predictable, and judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S. 649, 655 (1944). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra*, at 407 (Brandeis, J., dissenting). Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (*Burnet v. Coronado Oil & Gas Co., supra*, at 405-411 (Brandeis, J., dissenting); *United States v. Title Ins. Co.*, 265 U.S. 472 (1924); *The Genesee Chief v. Fitzhugh*, 12 How. 443, 458 (1852), the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Id. at 4819.

This case is a constitutional one not correctable by legislation and, like *Payne*, involves a procedural rule – here the *res judicata* effect, as a matter of federal compulsion of the Double Jeopardy Clause, of Kipi's prior conviction for contempt – and application of a decision of this court "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings" of the majority's conclusions. *Id.*

The decision in this case demonstrates the practical unworkability of the *Grady* rule, and the likelihood of confusion and misapplication that *Grady* generates. *Cf. United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990) (three separate opinions purporting to apply the "same conduct" test from *Grady*, none agreeing on a rationale, and some disagreeing on the result).

The most important flaw in the *Grady* rule is that, as this case demonstrates, it too easily disintegrates into the general "single transaction" test[7] that has long been

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[7] Because the Hawaii Supreme Court's decision effectively expanded the *Grady* doctrine to bar a subsequent prosecution in which the State proves conduct satisfying only *some* elements of the offense already tried (or, given the *corollary Grady* principle, *see* footnote 5; 110 S. Ct. at 2093 n.11, in which the government in the first prosecution proved a fact supporting any single element of the anticipated second prosecution), the Hawaii decision does indeed collapse *fully* into the "single transaction" test, under which all offenses arising out of the same episode must be tried together. That is because it is virtually impossible to imagine an episode giving rise to multiple offenses that doesn't have a single fact of common relevance to an element of each of the offenses. The clearest

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condemned by this Court's Double Jeopardy jurisprudence, and which is condemned even in *Grady* itself. *See Grady*, 110 S. Ct. at 2094 n.15 (This Court has " 'steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause.' ") (quoting *Garrett v. United States*, 471 U.S. 773, 790 (1985)). Indeed, as the Supreme Court of Hawaii could not help but observe, "what the new double jeopardy test in effect requires is that prosecutors observe a rule previously rejected by the Supreme Court 'that all charges arising out of a single occurrence must be joined in a single indictment.' " *State v. Kipi*, Slip Op. at 14, Pet. App. at 15a (quoting *Grady*, 110 S. Ct. at 2096 (Scalia, J., dissenting)). Thus, while *Grady* purported to adopt a narrower test, the Supreme Court of Hawaii found it virtually impossible to apply in any way except as one would the (impermissible) "same transaction" test. Justice Scalia's concern that the lower courts would not know "what precisely [*Grady*] means," 110 S. Ct. at 2104, is well borne out here. In this case the Supreme Court of Hawaii attempted to paper over the irrationalities of the *Grady* test by interpreting *Grady* to bar Kipi's trial for crimes based on "the same conduct that *led* to his contempt conviction." *See* Pet. App. 14a (emphasis added).

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example of such a common fact is the *identity* of the perpetrator of the offenses. The government in the subsequent prosecution will always try to prove that the defendant was the actor engaged in the criminal actions and that proof will also support, given the fact that the offenses arise out of the same criminal episode, the fact that the defendant was also the perpetrator of the offense tried in the first prosecution, and vice-versa.

But the court below, like the *Grady* majority, could not identify precisely what the term "same conduct that led" to the prior conviction meant, or how lower courts in Hawaii were to do so in future cases. While *Grady* purports to hold that the "same transaction" test is *not* to be used, *Grady*'s lack of precise guidance as to how the actual proof in the first and second cases is to be evaluated led the Supreme Court of Hawaii to do just that.

This case also demonstrates the distortion of litigation strategy engendered by the strained and ambiguous *Grady* test, which the dissenting Justices in *Grady* also forcefully condemned. Thus, although the State does not need to establish "intent to terrorize" to prove its contempt case, *see* footnote 5, proof thereof may be strong evidence in the contempt case. But if the State presents such evidence in its contempt case, the complete crime of terroristic threatening would be proven, thereby barring, under the *Grady* corollary, a subsequent trial on the terroristic threatening charge. *See id.*; 110 S. Ct. at 2093 n.11. Consequently, *Grady* puts the prosecutor in the dilemma of having to withhold her best evidence in the contempt case in order to preserve the right to proceed later on the terroristic threatening charges. Likewise, the defense has every incentive to provoke the prosecutor into introducing the damaging evidence in the first trial in order to bar later prosecution on the more serious terroristic threatening charge. *Cf.*, 110 S. Ct. at 2104 (Scalia, J., dissenting) (noting this precise "role-reversal" in converse situation). The same absurd situation may likewise apply to the burglary charge. As Justice Scalia stated, this "makes for high comedy but inferior justice." *Id.* at 2104.

This case also highlights *Grady*'s departure from precedent, both long-standing and recent, as well as the plain meaning of the text of the Double Jeopardy Clause. As Justice O'Connor emphasized in her separate dissenting opinion, *Grady*'s proof-based analysis fundamentally undercut another decision of the 1989 Term, *Dowling v. United States*, 110 S. Ct. 668 (1990). And, as Justice Scalia's dissent demonstrates, *Grady* indeed departs from a very long line of precedent, from the English common law rules on which the Double Jeopardy Clause was founded, to more than fifty years of Double Jeopardy decisionmaking under *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court of Hawaii, as well, recognized *Grady*'s sharp departure from past precedent, but, of course, was required to attempt to comply with *Grady*'s dictates.

The simple application of the *Blockburger* test, with the exceptions provided in *Ashe v. Swenson*, 397 U.S. 436 (1970) (second prosecution barred where it requires relitigation of a factual issue necessarily resolved in defendant's favor in the first prosecution), and *Harris v. Oklahoma*, 433 U.S. 682 (1977) (second prosecution barred where offense expressly incorporates another offense without specifying the latter's elements), *see Grady*, 110 S. Ct. at 2097 (Scalia, J., dissenting), provides a more workable and logical alternative to the *Grady* doctrine. While Petitioner submits that the confusion in the lower court's opinion is error under, rather than compliance with, *Grady*, overruling *Grady*'s substantial departure from the text, history, and logic of this Court's prior Double Jeopardy jurisprudence is equally open to this Court, and should be done if the Court cannot otherwise overturn

the decision below, or if this Court decides to hold that, as a general matter, *Grady* should be reconsidered and overruled. *See Payne v. Tennessee*, No. 90-5721 (U.S. Feb. 15, 1991) (argument order); *cf. United States v. Leon*, 468 U.S. 897, 905 (1968) (court may "take the case as it comes to us, accepting the [lower court's] conclusion" that under present law reversible constitutional error exists).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case down for briefing and argument, and, thereupon, reverse the judgment below.

Dated: Honolulu, Hawaii, August 6, 1991.

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City and County of Honolulu

WARREN PRICE, III*
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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF HAWAII

---oOo---

STATE OF HAWAII, Plaintiff-Appellant, vs.
JONATHAN K. KIPI, Defendant-Appellee

NO. 14367

APPEAL FROM THE FIRST CIRCUIT COURT

(CR. NO. 89-1647)

May 8, 1991

LUM, C.J., PADGETT, HAYASHI, WAKATSUKI, AND MOON, JJ.

DOUBLE JEOPARDY – offenses, elements, and issues foreclosed – compulsory joinder requirement, in general.

Under Hawaii Revised Statutes (HRS) § 701-109(2), a criminal contempt charge must be tried with any other offense arising from the same conduct, except where the other offense or the contempt offense was not known to the prosecuting officer at the time of the first trial, or the contempt offense is not within the jurisdiction of the same court as the other offense.

SAME – same – identity of offenses; same offense.

Under test of United States Supreme Court in *Grady v. Corbin*, 110 S. Ct. 2084 (1990), defendant prosecuted for criminal contempt cannot subsequently be prosecuted for substantive criminal offenses based on the same conduct without violating double jeopardy clause of fifth amendment to U.S. Constitution.

SAME – same – same.

Where defendant pled no contest to criminal contempt charge for violation of family

court protective order based on entering ex-girlfriend's home and threatening her and two of her housemates, and family court sentenced defendant to five months incarceration based on those facts, defendant could not subsequently be prosecuted in circuit court on burglary and terroristic threatening charges based on the same conduct that supported the criminal contempt conviction.

OPINION OF THE COURT BY MOON, J.

Plaintiff-appellant State of Hawaii (State) appeals the trial court's dismissal of burglary and terroristic threatening charges against defendant-appellee Jonathan K. Kipi (Kipi). The charges were based on the same conduct that supported a criminal contempt charge against Kipi for which he had already been convicted and sentenced by the family court. We find that double jeopardy principles bar the subsequent prosecution and therefore affirm the trial court's dismissal.

I.

On October 11, 1989, at 4:00 a.m., Kipi entered the home of his ex-girlfriend, Linda Yamasaki (Yamasaki). While in the residence, Kipi threatened Yamasaki and two other persons, Sergio Chaulet (Chaulet), Yamasaki's boyfriend, and David Harris (Harris), Yamasaki's housemate. A complaint against Kipi was filed on October 24, 1989, for the offense of Burglary in the First Degree, in violation of HRS § 708-810(1)(c) (count I) and Terroristic Threatening in the Second Degree, in violation of HRS § 707-717(1), based on the threats against Yamasaki, Chaulet and Harris (counts II, III and IV, respectively).

On November 6, 1989, Kipi pleaded not guilty to the charges in the complaint.

Before the incident in question, Yamasaki had petitioned the family court for a temporary restraining order (TRO) for protection against Kipi. Yamasaki's petition was granted on August 7, 1989 and a TRO issued. On August 21, 1989, the family court extended the protective order, pursuant to a show cause hearing, until February 17, 1990. Thus, the protective order was in effect at the time Kipi broke into Yamasaki's house on October 11, 1989. The protective order was a form order in which the following was checked:

> Petitioner(s) [Yamasaki] and Respondent(s) [Kipi] are mutually enjoined and restrained from contacting, threatening or abusing each other and anyone living with the other party (including but not limited to their home or place of employment) and maliciously damaging the property of the other party.

On October 12, 1989, the day after Kipi's alleged burglary and threats, a police officer filed a family court petition against Kipi alleging that he had intentionally disobeyed the protective order and thereby committed the offense of Criminal Contempt of Court, in violation of HRS § 710-1077. On December 7, 1989, the State was ready to proceed to trial in family court on the contempt charge against Kipi when he moved to change his plea to no contest. The State did not object to the change of plea, but asked that five months of incarceration be imposed upon Kipi because of the egregious nature of the offense. In responding to the court's request for particular facts constituting the protective order violation, the prosecutor stated that:

a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki, at her home on October 11, 1989, very early in the morning.

b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the Defendant enter into her home.

c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio [sic] Chaulet, and Ms. Rebecca Moore, all of whom reside with Ms. Yamasaki.

d. At the time of the violation, the Defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio [sic] Chaulet, and Mr. David Harris.

In addition, the prosecutor noted on the record that he believed, based upon his reading of the police report, that additional criminal charges might be brought against Kipi. The State has stipulated that the prosecutor knew of the pending burglary and terroristic threatening charges that had been filed in circuit court.

The family court accepted Kipi's plea of no contest and sentenced him to five months incarceration.

On February 13, 1990, jury selection began for the burglary and terroristic threatening offenses. After the jury was selected but before the jurors were sworn, the defense orally moved to dismiss the entire complaint based on double jeopardy and HRS § 701-109, the compulsory joinder rule. The trial court agreed that Kipi was being retried for the same actions for which he was serving five months. However, the court dismissed only counts I and II, which involved Yamasaki, because the

court believed that the family court order specifically dealt with her alone. The court declined to dismiss counts III and IV, which involved Chaulet and Harris, on the ground that these offenses were outside the jurisdiction of the family court when it ruled on the violation of the protective order. Trial on counts III and IV continued.[1] The jury was unable to reach a decision and the court declared a mistrial. The State has not retried counts III and IV, and now appeals the dismissal of counts I and II.

II.

The State alleges that the trial court erred in ruling that Kipi's no contest plea in family court to a misdemeanor criminal contempt charge bars subsequent prosecution of the related burglary and terroristic threatening charges in circuit court. In responding to the State's argument, we address the following two issues:

1. Is there a conflict between HRS § 701-109(2), the compulsory joinder rule, and HRS § 710-1077(4), which allows prosecution for substantive offenses in addition to contempt?

2. Can actions or evidence that support a contempt prosecution also be used to support a subsequent prosecution on substantive criminal charges without violating the double jeopardy rules set forth by the United States Supreme Court in *Grady v. Corbin*, 110 S. Ct. 1094 (1990)?

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[1] Kipi would not agree to a stay pending the State's appeal of the dismissal of counts I and II, and the State's motion to stay proceedings was denied.

III.

A. Is there a conflict between HRS § 701-109(2), the compulsory joinder rule, and HRS § 710-1077(4), which allows prosecution for substantive offenses in addition to contempt?

HRS § 701-109(2) provides that

> a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

The Commentary to the statute notes that this subsection "requires joinder of the trials of two or more offenses based on the same conduct," subject to the court's power to order severance if justice so requires. *See* HRS § 701-109(3). The rule reflects a policy "that defendants should not have to face the expense and uncertainties of two trials based on essentially the same episode." HRS § 701-109 Commentary. This compulsory joinder of offenses requirement of § 701-109(2) acts as a procedural limitation on the State's power under § 701-109(1)[2] to

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[2] HRS § 701-109(1) provides as follows:

> When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. He may not, however, be convicted of more than one offense if:

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seek convictions for all offenses resulting from a single course of conduct. *State v. Aiu*, 59 Haw. 92, 96, 576 P.2d 1044, 1047 (1978).

The criminal contempt statute, HRS § 710-1077, provides that when a contempt also constitutes another offense, the contemnor may be charged with and convicted of the other offense "notwithstanding the fact that he has been charged with or convicted of the contempt." HRS § 710-1077(4). This provision is consistent with HRS § 701-109(1)'s provision that when the same conduct may establish an element of more than one offense, the defendant may be prosecuted for each offense.

The compulsory joinder requirements of HRS § 701-109(2) would also apply to contempt charges. A contempt charge must therefore be tried with any other

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(a) One offense is included in the other, as defined in subsection (4) of this section; or

(b) One offense consists only of conspiracy or solicitation to commit the other; or

(c) Inconsistent findings of fact are required to establish the commission of the offenses; or

(d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

offense arising from the same conduct, except where the other offense or the contempt offense was not known to the prosecuting officer at the time of the first trial, or the contempt offense is not within the jurisdiction of the same court as the other offense or offenses. The compulsory joinder statute is not inconsistent with the contempt statute, the former simply places limits on the latter.

In the context of the present case, the compulsory joinder rule does not apply, because the contempt charge and the other charges were not within the jurisdiction of a single court.[3] Family court had exclusive jurisdiction of the contempt charge and did not have original jurisdiction over the burglary and terroristic threatening charges, contrary to Kipi's argument that family court, as a division of circuit court, has the same general jurisdiction as circuit court. *See* HRS § 571-14(2) (family court shall have exclusive original jurisdiction to try adults charged with any violation of an order issued by a family court judge). Although family court may waive its jurisdiction over an offense, such a waiver is discretionary and not mandatory. *Id.* The circuit court in this case had no jurisdiction to try the contempt charge unless the family court chose to waive its jurisdiction. Moreover, as a court of limited jurisdiction, the family court could not hear the burglary and terroristic threatening charges. Thus, HRS

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[3] The other requirement of HRS § 701-109(2) is that the offenses be known to the prosecutor at the time of the first trial. As noted earlier, it is uncontested that the deputy prosecutor in this case knew about the burglary and terroristic threatening charges when the state proceeded to trial on the contempt charge.

§ 701-109(2) did not require compulsory joinder in this instance.

Resolution of this statutory issue, however, does not resolve the constitutional issue raised by Kipi below that double jeopardy bars any later prosecution based on the conduct supporting his conviction for criminal contempt.

B. Can actions or evidence that supported a contempt prosecution also be used to support a subsequent prosecution on substantive criminal charges without violating the double jeopardy rule set forth by the United States Supreme Court in Grady v. Corbin, 110 S. Ct. 2084 (1990)?

Until recently, both federal and state double jeopardy law was an outgrowth of *Blockburger v. United States*, 284 U.S. 299 (1932), in which the United States Supreme Court held that the "Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not 'requir[e] proof of a fact which the other does not.' " *Grady*, 110 S. Ct. at 2087. In the present case, the protective order restrained Kipi from "contacting, threatening, or abusing [Linda Yamasaki] and anyone living with [her]." In order to prosecute the contempt charge, the State was required to prove that Kipi contacted, threatened, or abused Yamasaki or any of her housemates; that Kipi knew he was ordered not to do so; and that he intentionally disobeyed the order. HRS § 710-1077(g). To prosecute the burglary charge, the State would be required to prove that Kipi intentionally entered Yamasaki's house in reckless disregard that it was another's dwelling with the

intent to commit a crime therein. HRS § 708-810(1)(c). To prove the terroristic threatening charge, the State would have to show that Kipi intentionally or recklessly threatened Yamasaki, Harris, and Chaulet. HRS § 707-717. Thus, to prove the burglary and terroristic threatening charges, the State would be required to prove facts different from and additional to those it used to prove the criminal contempt charge in this case. Therefore, under the traditional *Blockburger* test, the subsequent prosecution of the burglary and terroristic threatening charges in this case would not have been barred.

However, in May 1990 the Supreme Court broadened the scope of double jeopardy protection. In *Grady v. Corbin*, 110 S. Ct. 2084, 2093 (1990), the Supreme Court held that

> the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

In *Grady*, defendant Corbin's automobile struck oncoming vehicles, causing the death of one person and serious injury to another. Corbin was served with two misdemeanor traffic tickets, one charging him with driving while intoxicated and the other with failing to keep to the right of the median. He pleaded guilty to the traffic citations. The presiding judge, who was not informed of the fatality or pending homicide investigation, accepted the guilty plea and later imposed a sentence on Corbin of a $350 fine, a $10 surcharge, and a six-month license revocation. Two months after the sentencing on the traffic

violations, a grand jury indicted Corbin, charging him with, among other violations, reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. A bill of particulars identified three acts upon which the prosecution would rely to prove the charges: (1) operation of a motor vehicle on a public highway in an intoxicated condition; (2) failing to keep right of the median; and (3) driving at a speed too fast for the weather and road conditions.

Corbin moved to dismiss the indictment on the constitutional ground of double jeopardy. The New York Court of Appeals reversed the lower court's refusal to dismiss the indictment, finding that the State's intention to rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges violated the U.S. Supreme Court's dictum in *Illinois v. Vitale*, 447 U.S. 410 (1980). *Vitale* had suggested that, even if two successive prosecutions were not barred by the *Blockburger* test, the second prosecution would be barred if the government sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution. *Vitale*, 447 U.S. at 420. The United States Supreme Court affirmed the New York Court of Appeals' decision in *Grady*, and adopted the "same conduct" suggestion from *Vitale*. *Grady*, 110 S. Ct. 2084.

In reaching its holding in *Grady*, the Supreme Court "rejected the contention that the test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) – which provides that cumulative penalties, and thus successive prosecutions, should not be barred if each offense charged requires proof of an element which the

other does not – constituted the full extent of double jeopardy protection." *United States v. Gambino*, 742 F. Supp. 855, 857 (S.D.N.Y.), *aff'd*, 923 F.2d 846 (2d Cir. 1990) (citation omitted). Under the *Grady* test, Kipi cannot be prosecuted for burglary or for terroristic threatening. The conduct that the State would use to prove those crimes is the identical conduct that the family court considered when it accepted Kipi's no contest plea, and particularly when it sentenced him to five months incarceration based on the egregiousness of the contempt violation. Kipi's entering of Yamasaki's house and his threats to her and two of her housemates was the exact conduct that constituted the offense of contempt with respect to the family court's protective order.

In *Grady*, the Supreme Court stated that "[t]he Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' " *Grady*, 110 S. Ct. at 2090 (citation omitted). Here, under the *Grady* rule, Kipi must be protected from a second prosecution and multiple punishments for offenses based on the same conduct as the contempt offense for which he was charged, convicted, and sentenced.

Apparently only one state supreme court to date has considered whether *Grady* applies to the prosecution of substantive criminal charges following a conviction for contempt based upon the same conduct.[4] In *State v.*

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[4] Several cases decided before *Grady* discussed the double jeopardy implications of contempt convictions with respect to

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Magazine, ___ S.C. ___, 393 S.E.2d 385 (1990), the facts of which are virtually the same as in this case, the South Carolina Supreme Court held that a defendant who was charged with contempt for violating a family court restraining order by physically abusing his estranged wife could not be prosecuted for assault and battery based on the same incident. The court found that because defendant was ordered by family court to serve one year in prison or pay to the court a fine of $1,500, the contempt sanction was criminal in nature. Thus, the Double Jeopardy Clause applied to protect against a second prosecution based on the same conduct.[5] The court concluded that at defendant's trial for assault and battery, the State proved the same conduct for which the defendant had previously been criminally sanctioned by the family court. Thus, under the *Grady* test, the successive prosecution violated the Double Jeopardy Clause. The court specifically rejected the State's contention that prosecution in a court of limited jurisdiction such as family court does not bar a subsequent prosecution in a court of general jurisdiction. ___ S.C. at ___, 393 S.E.2d at 387 n.4.

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subsequent prosecutions for substantive offenses based on the same conduct. *See generally*, Annotation, *Contempt Findings as Precluding Substantive Criminal Charges Relating to Same Transaction*, 26 A.L.R.4th 950 (1983).

[5] It has generally been held that double jeopardy principles do not bar a subsequent criminal prosecution based on conduct for which a defendant has been found in civil contempt. *See* Annotation, *Contempt Findings as Precluding Substantive Criminal Charges Relating to Same Transaction*, 26 A.L.R.4th 950, 956 (1983).

In applying *Grady* to this case, we reach the same conclusion as did the South Carolina court. Kipi may not be subsequently prosecuted for the substantive offenses which were based on the same conduct that led to his contempt conviction. This point leads to a review of the Commentary to Hawaii's contempt statute, which states in pertinent part as follows:

> Subsection (4) [of HRS § 710-1077] provides that contempts which constitute both contempt and another offense do not relieve the defendant of liability for the other offense merely because its commission was contemptuous of the court. For example, if a person were to cause disorder in the courtroom, during the course of proceedings, by assaulting another person, he would be guilty of contempt. He would also be guilty of an assault. The fact that the court imposed summary punishment for the contempt, or *the fact that he was put in jeopardy for the misdemeanor offense of criminal contempt of court, would not allow the defendant to plead double jeopardy* to a charge of assault based on the same conduct.

HRS § 710-1077 Commentary (emphasis added). After *Grady*, this commentary is no longer valid. Constitutional principles of double jeopardy would bar a second prosecution for assault after a defendant was put in jeopardy for the offense of criminal contempt based on the same conduct. The circumstances of Kipi's case are analogous to the hypothetical of the commentary, and the *Grady* test applies.[6]

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[6] Questions remain as to the effect of a summary contempt proceeding on a later prosecution for substantive offenses. In

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As pointed out in Justice Scalia's dissenting opinion in *Grady*, what the new double jeopardy test in effect requires is that prosecutors observe a rule previously rejected by the Supreme Court "that all charges arising out of a single occurrence must be joined in a single indictment." *Grady*, 110 S.Ct. at 2096 (Scalia, J., dissenting). Based on the *Grady* rule, what a prosecutor should do in circumstances such as in the present case is to obtain a waiver from family court on the contempt charge and proceed in circuit court on all of the charges.[7]

In addition, although the issue is not specifically now before this court, we conclude that the *Grady* rule bars the prosecution (following the mistrial) of the other two charges against Kipi that were not dismissed by the court below. The trial court believed that these terroristic threatening charges, based on Kipi's threats to Yamasaki's housemates, were not within the jurisdiction of the family

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one pre-*Grady* case, the Supreme Court of Illinois affirmed a court of appeals ruling that a nonadversarial summary contempt proceeding arising out of an incident in which the defendant struck the prosecutor with his fist and which resulted in a sentence of six months' imprisonment did not involve the possibility of successive prosecutions and thus did not bar a subsequent indictment against the defendant for aggravated battery based on the same acts. *People v. Totten*, 118 Ill. 2d 124, 514 N.E.2d 959 (1986).

[7] Since the charges against Kipi were brought before *Grady* was decided, the prosecutor in the present case cannot be faulted for failing to obtain a waiver. In addition, the trial court's dismissal of charges that is now on appeal to this court occurred in February 1990, which means the court did not have *Grady* to rely on for law on double jeopardy.

court. However, that conclusion addresses only whether the charges should have been joined under HRS § 701-109(2). Because the protective order prohibited Kipi from contacting, threatening, or abusing not only Yamasaki but anyone living with her, and because the State informed the family court judge of Kipi's threats to the housemates, which the court apparently considered in entering the requested five-month jail sentence, double jeopardy principles bar a second prosecution based on those threats.

Based on the foregoing, we affirm the dismissal of counts I and II of the complaint, and remand this case with instructions that the remaining two counts of the complaint be dismissed.

Patricia A. Loo,
Deputy Prosecuting Attorney,
for plaintiff-appellant.

Theodore Y. H. Chinn
(Linda C. Ramirez with him
on the brief), Deputy
Public Defenders, for
defendant-appellee.

/s/ H. Lum

/s/ Frank Padgett

/s/ Yoshimi Hayashi

/s/ J. Wakatsuki

/s/ Ronald T.Y. Moon

APPENDIX "B"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII v. JONATHAN K. KIPI, Defendant.	CR. NO. 89-1647 COUNT I BURGLARY IN THE FIRST DEGREE COUNTS II – IV TERRORISTIC THREATENING IN THE SECOND DEGREE ORDER OF DISMISSAL OF COUNTS I AND II OF THE COMPLAINT FIRST CIRCUIT COURT STATE OF HAWAII FILED February 16, 1990 12:11 o'clock PM H. Mia Clerk

ORDER OF DISMISSAL OF COUNTS I AND II OF THE COMPLAINT

The Motion to Dismiss Complaint for Double Jeopardy and Section 701-109, *Hawaii Revised Statutes*, having been heard in open court on February 15, 1990, the State of Hawaii being represented by M. Rebecca Aduja, and William C. Bagasol, attorney for defendant, and the court having orally granted said motion as to Counts I and II and denied said motion as to Count IV,

IT IS HEREBY ORDERED that the motion to dismiss Counts I and II of the complaint be and hereby is granted. Counts I and II are dismissed with prejudice,

IT IS HEREBY FURTHER ORDERED that the motion to dismiss Count IV of the Complaint be and hereby is denied.

DATED at Honolulu, Hawaii: FEB 16 1990.

/s/ Marilyn P. Lee
MARILYN LEE [SEAL]
Judge of the above-entitled court

APPROVED AS TO FORM:

/s/ William Bagasol
WILLIAM C. BAGASOL
Deputy Public Defender
Attorney for Defendant

APPENDIX "C"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	)	
	)	CRIMINAL NO. 89-1647
vs.	)	
JONATHAN K. KIPI,	)	MOTION TO DISMISS
	)	
Defendant.	)	(2-15-90)
	)	

TRANSCRIPT OF PROCEEDINGS

before the Honorable MARILYN P. LEE, Judge, 5-C Division, presiding, on Thursday, February 15, 1990.

APPEARANCES:

For the State of Hawaii Deputy Prosecuting Attorney — REBECCA ADUJA, Esq.

For the Defendant Deputy Public Defender — WILLIAM BAGASOL, Esq.

REPORTED BY
K. Lee Murphy, RPR-CM, CSR 168
Official Court Reporter
State of Hawaii

Official Court Reporters
First Circuit Court
State of Hawaii

THURSDAY, FEBRUARY 15, 1990

THE CLERK: Criminal No. 89-1647, State of Hawaii vs. Jonathan K. Kipi. Motion to Dismiss Complaint for Double Jeopardy and 701-109.

MS. ADUJA: Rebecca Aduja, Deputy Prosecuting Attorney representing the State of Hawaii.

MR. BAGASOL: William Bagasol, Deputy Public Defender on behalf of Jonathan Kipi who is present in court.

THE COURT: Let the record reflect that we have convened this morning without the jury for the purpose of resolving the instant motion.

Ms. Aduja, I have received your Memorandum in Opposition to Motion to Dismiss Complaint for Double Jeopardy and Section 701-109.

And Mr. Bagasol, you have given me some information regarding your research on this matter.

And the record should reflect we have had the opportunity to informally discuss this in chambers.

Is there anything further that the prosecution would like to place on the record with respect to its argument?

MS. ADUJA: Your Honor, first of all, may the record reflect that I'm filing at this time in open court the State's memorandum in opposition to defendant's motion, with this Court's permission.

Thank you, Your Honor. Secondly, the State would like the Court to take judicial notice of all your files and documents in Criminal 89-1647.

Further, the State requests that this Court accept into evidence all of the exhibits attached to the State's memorandum in opposition to defendant's motion, which would be Exhibits A through and including F.

And further, Your Honor, I believe by stipulation the State would like this Court to accept the stipulations outlined in the affidavit of Mr. Marcus Oshiro.

THE COURT: You would like me to do what?

MS. ADUJA: Defense counsel and State will be stipulating into evidence the facts outlined in the affidavit of Marcus Oshiro and also allowing defense counsel an opportunity to cross-examine Mr. Oshiro.

THE COURT: Is he here?

MR. BAGASOL: Your Honor, he said he was going to take a smoke break.

My main thing, Your Honor, is that if called to testify I believe Mr. Oshiro would say that the burglary charge was noted in his discovery. That he knew about the burglary charge as well as the other – the terroristic threatening charge in the Family Court matter. I believe that would be his testimony.

Your Honor, just his – the only reason why I would like to cross-examine him is just to establish the fact that the prosecution had knowledge of these other cases that could have been dealt with in the one court or the other.

THE COURT: I think the State will stipulate to that. Will you?

MS. ADUJA: Yes, Your Honor, State so stipulates. I believe it has been indicated in Mr. Oshiro's affidavit.

THE COURT: So you waive cross-examination?

MR. BAGASOL: Yes, Your Honor.

THE COURT: All right. Judicial notice will be taken of the records and files in Criminal 89-1647, and for purposes of this proceeding exhibits attached to the memorandum will be considered in evidence.

And the Court will accept the affidavit of Marcus Oshiro as stipulated to by the State and the defense.

Any legal arguments that you wish to make that have not been made, Ms. Aduja?

MS. ADUJA: Your Honor, State's argument at this time first of all would be, number one, that it is an untimely motion by the defense. It is a pretrial motion, and therefore, timing-wise, this Court should not entertain this motion as it is clearly beyond the pretrial motions deadline.

THE COURT: Well, since this affects the rights of the defendant, a substantial right, and perhaps constitutional questions, that notwithstanding, the Court is not going to deny the motion based upon untimeliness.

MS. ADUJA: Thank you, Your Honor.

THE COURT: All right.

MS. ADUJA: And further, Your Honor, I'd like this Court to consider that the TRO violation may have stemmed just on the defendant's entry onto the property of Linda Yamasaki and not extend to encompass all of the facts that are enclosed in the instant matter.

THE COURT: However, within the transcript it's clear that those facts were presented to the presiding judge. The same facts. The threats and the breaking in.

Mr. Bagasol, do you have anything that you want to put on the record?

MR. BAGASOL: Your Honor, we believe that the facts should also encompass – Strike that, Your Honor.

THE COURT: If you have nothing, I'm ready to rule.

MR. BAGASOL: Just for the record, Your Honor, I'd like to cite just a few cases. I'd like to cite State vs. Miyasaki, 4 Hawaii 6411, which talks about the policy behind the double jeopardy clause. It quoted from Green vs. United States, 355 U.S. 184. Basically it talked about prohibiting repeat offense attempt to reprosecute the same, you know, the same matter.

And, Your Honor, based upon that, also based upon State v. Pia, and also we're citing Rule 8 of the Hawaii Rules of Penal Procedure which provides further authority to join offenses, we're going to strongly argue, Your Honor, that this is the same transaction, the same evidence as in the contempt matter which was resolved. And we're asking that this case be dismissed with prejudice.

THE COURT: Ms. Aduja, anything further?

MS. ADUJA: Your Honor, the State would just like to incorporate by reference all of the arguments set forth in the memorandum in opposition to defense motion and request that this Court, if she is so inclined to dismiss this action, may that dismissal be without prejudice.

Nothing further, Your Honor.

THE COURT: By the very nature of the motion, counsel, it would have to be with prejudice. If it's appealed and if the State is successful on its appeal, then my dismissal with prejudice would be reversed in any case and then you would be able to retry those counts. But I don't think it can be without prejudice at this point based upon the underlying basis for the motion.

I have reviewed the memorandum submitted by the State, and Ms. Aduja, you've presented the Court with I believe a fairly complete view of what occurred in the prior proceeding.

And it is clear to the Court that this defendant is being retried in this case for the same actions for which he is currently serving five months incarceration as previously ordered by Judge William Smith in the family court proceeding.

Even though we could characterize this as legally as two separate criminal contempt of court actions, and Family Court being a violation of a court order with the judge being the complainant, we have to look at the underlying basis for the charge. And we have to look at what was considered by the judge.

And it's clear from all that's been presented to the Court by the prosecution in this case that Judge Smith considered all of defendant's actions, the actions in threatening the housemates, the actions in threatening Ms. Yamasaki, and the breaking in. And as a result of that, sentenced this defendant to five months in jail.

Now, I'm going to grant the motion only as to Count I and II, the counts dealing with Linda Yamasaki. Because

I believe that that is what the family court was dealing with in the restraining order.

I do still think that Mr. Kipi's actions against the other two individuals, Mr. Harris and Mr. Chaulet, constitute separate crimes if proved beyond a reasonable doubt. And the issue then becomes, well, could that have been tried in Family Court. I don't think that that could have been tried in the Family Court.

These terroristic threatening cases I think were outside of the jurisdiction at the Family Court when it ruled on the violation of the temporary restraining order. And for that reason I think that these are separate offenses and that this Court has jurisdiction, separate jurisdiction over those offenses, and that Family Court could not have tried those cases at the time that the TRO was being considered.

I think as a matter of fundamental fairness to this defendant he cannot twice have to go through a trial for the same actions. And he cannot twice be punished for committing the same actions.

It was the decision of the Office of the Prosecuting Attorney to go forward on the contempt action first and to present those facts before the presiding judge. The presiding judge clearly gave the defendant a severe sentence based upon the totality of the circumstances in fact that were presented to him, including the threats and the breaking in.

And so I think that it would be a violation of double jeopardy to again try the defendant for burglary and terroristic threatening as against Ms. Yamasaki, and for

that reason I'm going to dismiss Counts I and II granting the motion with respect to those counts. They are dismissed with prejudice. And allow the State to proceed as to Counts III and IV.

MS. ADUJA: Your Honor, at this time State makes a motion to reconsider this Court's order.

THE COURT: Denied.

MS. ADUJA: Then at this time, Your Honor, State requests that the record reflect the State's intent to file an appeal on this Court's order denying defendant – excuse me, granting defendant's Motion to Dismiss Counts I and II based on double jeopardy.

THE COURT: So noted.

(End of Motion to Dismiss)

APPENDIX "D"

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LINDA K. YAMASAKI, Petitioner(s) vs. JONATHAN K. KIPI, Respondent(s)	FC-DA No. 89-0656 PROTECTIVE ORDER Hearing Date: AUG 21 1989 Judge: ALBERT GOULD FAMILY COURT FIRST CIRCUIT COURT STATE OF HAWAII FILED 9:58 o'clock AM AUG 21 1989 L. DUNAWAY /s/ L. Dunaway Clerk

PROTECTIVE ORDER

Parties present at the hearing:

(X) Petitioner(s)
( ) Petitioner(s)'s attorney _____
(X) Respondent(s)
( ) Respondent(s)'s attorney _____
(X) Other: F. Andres, ASB

A Petition for an extension of a temporary restraining order was heard by this Court on the above-indicated date.

After full consideration of the relevant evidence:

IT IS ORDERED that a protective order shall issue and shall continue in effect through FEB 17 1990.

IT IS FURTHER ORDERED that:

A. Contacts, Threats, and Abuse

__1__. (X) Petitioner(s) and Respondent(s) are mutually enjoined and restrained from contacting, threatening or abusing each other and anyone living with the other party (including but not limited to their home or place of employment) and maliciously damaging the property of the other party;

_____. ( ) Contact between the parties will be allowed for visitation and counseling purposes only;

_____. ( ) Respondent(s) is/are required to immediately vacate:

_____;

__2__. (X) Respondent(s) is/are enjoined and restrained from contacting, threatening, abusing Shawna Leilani Cheino Kipi, born May 29, 1988 at ~~his~~/her/~~their school~~(s)/~~daycare~~/babysitter located at: Geri Aoki, 98-626 Kaamilo Place, Aiea, Hawaii 96701

_____. ( ) Petitioner(s) ( ) Respondent(s) may pick up personal belonging with a police escort at:

_____;

B. Counseling, Temporary Custody, and Visitation

_____. ( ) Respondent(s) shall attend and fully participate in counseling at or as directed by _____; ( ) Petitioner(s) shall attend and fully participate in counseling at or as directed by _____ and to attend each and every session unless excused by the therapist and/or until clinically discharged. Parties

shall contact appropriate program within one week of hearing. Parties shall pay for services according to the program's sliding scale.

SERVICE PROVIDERS are requested to provide the Court with a written report which will reflect the dates of contact, dates of unexcused absences, and any recommendations for further counseling/therapy. (Reports may be mailed to Adult Services Branch, Family Court, P.O. Box 3498, Honolulu, Hawaii 96811);

_____. ( ) Petitioner(s) shall have temporary physical custody of Shawna Leilani Cheino Kipi, born May 29, 1988

_____;

__3__. (X) Respondent(s) is/axx allowed visitation with Shawna Leilani Cheino Kipi, born _____

_____ as follows:

mutually agreed upon by the parties.

C. Other orders

This Protective Order shall be binding upon the parties to the action and also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them.

ANY VIOLATION OF THIS PROTECTIVE ORDER MAY BE PUNISHABLE BY A JAIL SENTENCE AND/OR A FINE.

DATE: HONOLULU, HAWAII, AUG 21 1989

/s/ Albert Gould [SEAL]
Judge of the above-entitled Court

APPENDIX "E"

STATE OF HAWAII
FAMILY COURT, FIRST CIRCUIT

[ ] ORDER _____
[✔] JUDGMENT
[ ] JUDGMENT OF ACQUITTAL

STATE OF HAWAII vs. (DEFENDANT)
Jonathan Kineola Kipi

(Date of Hearing: DEC 7 1989)

FC-CR No. 89-3049
Police Report No. 89349303
ORIGINAL [ ] HRS Sec. 709-906
CHARGE: [✔] HRS Sec. 710-1077
[ ] HRS Sec.

FAMILY COURT
FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
10:15 o'clock AM
DEC 7 1989
/s/ W Yip
Clerk

1 Defendant entered a plea of [ ] guilty [ ] not guilty [✔] no contest [✔] as charged [ ] to the amended charge of HRS Sec. _____

THE COURT FINDS that:

2 Defendant is [✔] guilty [ ] not guilty [✔] as charged [ ] as amended.

THE COURT ORDERS [✔] AND SENTENCES DEFENDANT as follows:

_____ The [ ] oral [ ] written MOTION for [ ] DAGP [ ] DANCP [ ] _____ was [ ] denied [ ] granted [ ] withdrawn [ ] for

a period of _____ from date of this order [ ] and subject to the Terms and Conditions below. Counsel shall file written motion for disposition within seven days after expiration of deferral period.

____ The case is DISMISSED [ ] with [ ] without prejudice.

____ BAIL is [ ] set at _____ [ ] increased to _____ [ ] reduced to _____ [ ] returned to the defendant [ ] _____

____ Defendant is released on own recognizance [ ] and bail is set aside [ ] to post bail by _____ .

____ Defendant is committed to _____ to be examined by a ___ doctor panel for [ ] penal responsibility [ ] fitness to proceed. The Order for Examination of Defendant And Appointment of Examiners will be forthcoming.

____ Defendant is ordered to appear on _____ at _____ for [ ] fitness to proceed [ ] trial [ ] pretrial and on _____ at _____ for jury trial before the Senior Judge of the Family Court in Ctrm No. _____ .

3 Defendant shall be INCARCERATED at OCCC for a period of 5 months.

____ days suspended for a period of one year on the following conditions:

____ Defendant is referred [ ] to _____ , for COUNSELING [ ] to ___ , for a substance abuse assessment and shall participate in counseling and/or treatment until discharged. Defendant shall contact said agency within _____ weeks [ ] from this date [ ] after release from incarceration. Service providers shall provide to the Prosecuting Attorney's Office a written report.

____ Defendant shall remain arrest and conviction free for a period of one year.

_____ Defendant shall make no further threats or abuse family/household members.

4 MITTIMUS to issue [✔] forthwith [ ] effective: .

_____ Defendant is placed on PROBATION for a period of _____, subject to all of the Terms and Conditions of Probation attached hereto.

_____ Defendant shall perform ___ hours of COMMUNITY SERVICE by _____ .

_____ Defendant shall pay a FINE of $_____ , to be paid by: _____

_____ [ ] bail applied to fine.

5 Defendant is given credit for time served since he was held in custody at OCCC (for this case and other related charges.)

DATE: DEC 7 1989

JUDGE OF THE ABOVE-ENTITLED COURT:

/s/ William Smith

WILLIAM SMITH [SEAL]

---

[x]	Defendant	[ ]	Agency
[✔]	Deft's Atty*	[ ]	CSSP
[x]	DPA - M. Oshiro	[ ]	Cellblock
[ ]	Cashier	[ ]	OCCC
[✔]	ASB	[✔]	HPD
[ ]	APD (3)		

* Sheila Lippolt

APPENDIX "F"

NO. 14367

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v. JONATHAN KIPI, Defendant-Appellant.	CRIMINAL NO. 89-1647 APPEAL FROM THE ORDER OF DISMISSAL OF COUNTS I AND II OF THE COMPLAINT, FILED ON FEBRUARY 16, 1990 FIRST CIRCUIT COURT HONORABLE WENDELL HUDDY HONORABLE STEVEN H. LEVINSON HONORABLE MARILYN P. LEE JUDGES FILED MAY 20 1991

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii, entered on May 8, 1991, the order of dismissal of counts I and II of the complaint is affirmed, and the case is remanded with instructions that the remaining two counts of the complaint be dismissed.

Dated: Honolulu, Hawaii: MAY 20 1991.

BY THE COURT:

/s/ L. Nakagawa
Clerk

APPROVED:

/s/ Ronald T. Y. Moon
Justice

[Seal]

APPENDIX "G"

The following are excerpts from the briefs filed by the State of Hawaii in the Supreme Court of the State of Hawaii.

III.

STATEMENT OF THE POINTS OF ERROR

1. The trial court erred in granting Defendant's motion to dismiss as to Counts I and II of the complaint based on **Section 701-109, *H.R.S.*** and double jeopardy.

Defendants moved to dismiss the complaint based on **Section 701-109, H.R.S.** and double jeopardy. Transcript of Proceedings, February 15, 1990, page 2 ("Tr. ___, ___"). Hearing on the motion was heard before the Honorable Marilyn P. Lee, Judge presiding, in the Circuit Court of the First Circuit on February 15, 1990. Tr. 2/15/90, 2-9. The court thereafter dismissed Counts I and II of the complaint and denied dismissal on Counts III and IV, ruling as follows:

> And it is clear to the Court that this defendant is being retried in this case for the same actions for which he is currently serving five months incarceration as previously ordered by Judge William Smith in the family court proceeding.
>
> Even though we could characterize this as legally as two separate criminal contempt of court actions, and Family Court being a violation of a court order with the judge being the complainant, we have to look at the underlying basis for the charge. And we have to look at what was considered by the judge.

And it's clear from all that's been presented to the Court by the prosecution in this case that Judge Smith considered all of defendant's action, the actions in threatening the housemates, the actions in threatening Ms. Yamasaki, and the breaking in. And as a result of that, sentenced this defendant to five months in jail.

Now, I'm going to grant the motion only as to Count I and II, the counts dealing with Linda Yamasaki. Because I believe that that is what the family court was dealing with in the restraining order.

I do still think that Mr. Kipi's actions against the other two individuals, Mr. Harris and Mr. Chaulet, constitute separate crimes if proved beyond a reasonable doubt. And the issue then becomes, well, could that have been tried in the Family Court.

These terroristic threatening cases I think were outside of the jurisdiction at the Family Court when it ruled on the violation of the temporary restraining order. And for that reason that I think that these are separate offenses and that this Court has jurisdiction, separate jurisdiction over those offenses, and that Family Court could not have tried those cases at the time that the TRO was being considered.

I think as a matter of fundamental fairness to this defendant he cannot twice have to go through a trial for the same actions. And he cannot twice be punished for committing the same actions.

It was the decision of the Office of the Prosecuting Attorney to go forward on the contempt action first and to present those facts before the presiding judge. The presiding judge clearly gave the defendant a severe sentence based upon the totality of the circumstances in fact

that were presented to him, including the threats and the breaking in.

And so I think that it would be a violation of double jeopardy to again try the defendant for burglary and terroristic threatening as against Ms. Yamasaki, and for that reason I'm going to dismiss Counts I and II granting the motion with respect to those counts. They are dismissed with prejudice. And allow the State to proceed as to Counts III and IV.

Tr. 2/15/90, 7-9.

The order of dismissal was filed on February 16, 1990.

. . . .

V.

STATEMENT OF QUESTIONS PRESENTED

1. WHETHER DEFENDANT'S PLEA OF NOLO CONTENDERE IN THE FAMILY COURT BARS SUBSEQUENT PROSECUTION IN A RELATED FELONY MATTER IN CIRCUIT COURT.

Opening Brief of the State of Hawaii filed June 5, 1990 in the Supreme Court of the State of Hawaii (No. 14367), at pp. 5-6, 7.

* * *

Defendant argues that "[t]he conduct underlying the offense of contempt is identical to the conduct underlying the burglary and terroristic threatening offenses." Answering Brief, 15. On the contrary, the offense of contempt of court is a distinct and separate offense from that

of burglary in the first degree (count I) and terroristic threatening in the second degree (count II). Defendant pled guilty to the offense of contempt of court in violation of **Section 710-1077, *H.R.S.*** where he failed to comply with the Temporary Restraining Order for Protection issued by Judge Choy on August 21, 1989. That order, in pertinent part, specifically *restrained Defendant from contacting, threatening, or abusing Linda Yamasaki or anyone living with Linda Yamasaki. See,* Memorandum in Opposition to Motion to Dismiss Complaint for Double Jeopardy and Section 701-109, *H.R.S.* Exhibit A, Record on Appeal, 57-109.

The proof required for this specific offense of contempt of court was not only that Defendant contacted and threatened Linda Yamasaki at her home, but also that Defendant was (1) ordered not to do so (2) by a valid order of the court, that (3) Defendant was aware of that order restraining him, and Defendant (4) intentionally disobeyed that order.

Certainly, proof of this offense is not only different but requires less proof than is required for burglary and terroristic threatening. Proof of these offenses required far more proof of elements as Defendant was charged as follows:

> Count I: On or about the 11th day of October, 1989, in the City and County of Honolulu, the State of Hawaii, Jonathan K. Kipi did intentionally enter and remain unlawfully in a building, to wit, the residence of Linda K. Yamasaki, situated at 3218 Frances Street, with intent to commit therein a crime against a person and property rights and did recklessly disregard the risk that the building was the dwelling of

> another, thereby committing the offense of Burglary in the First Degree in violation of Section 708-810(1)(c), *H.R.S.*
>
> Count II: On or about the 11th day of October, 1989, in the City and County of Honolulu, State of Hawaii, Jonathan K. Kipi threatened, by word or conduct, to cause bodily injury to Linda K. Yamasaki in reckless disregard of the risk of terrorizing said Linda K. Yamasaki, thereby committing the offense of Terroristic Threatening in the Second Degree in violation of Section 707-717 (1), *H.R.S.*

Proof of the offenses of burglary and terroristic threatening *does not also constitute proof of the offense of contempt of court* as Defendant argues. Clearly, proof of the offenses of burglary and terroristic threatening did not prove "conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 47 Cr. L. 2091 (U.S. May 29, 1990).

Reply Brief of the State of Hawaii filed September 4, 1990 in the Supreme Court of the State of Hawaii (No. 14367), at pp. 2-3.

APPENDIX "H"

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	FC-O No. 89-0656
vs.	POLICE REPORT NO. 89349303
JONATHAN KINEOLA KIPI	PETITION BY POLICE OFFICER
Defendant	

PETITION BY POLICE OFFICER

TO THE HONORABLE PRESIDING JUDGE OF THE ABOVE-ENTITLED COURT.

The undersigned Petitioner, a duly appointed police officer of this jurisdiction, does hereby solemnly and sincerely declare under penalty of perjury, that the statements made herein are true to the best of Petitioner's knowledge, information and belief.

The above named Defendant appears to come within the purview of Chapter 586 of the Hawaii Revised Statutes.

On or about the 11 day of October, 1989, in the City and County of Honolulu, State of Hawaii, JONATHAN KINEOLA KIPI did intentionally disobey or resist the process, injunction or other mandate of a court by failing to comply with the Temporary Restraining Order for Protection of the Honorable DARRYL CHOY, Judge, Family Court, submitted and filed on August 21st, 1989, which was issued pursuant to Chapter 586-4, Hawaii

Revised Statutes thereby committing the offense of Criminal Contempt of Court, in violation of Section 710-1077 of the Hawaii Revised Statutes.

WHEREFORE, Petitioner prays that an inquiry be made into the foregoing allegations, and that such action be taken within Chapter 586-4 of the Hawaii Revised Statutes, Section 710-1077 of the Hawaii Revised Statutes.

DATED: Honolulu, Hawaii: 10-11-89

/s/ Hyran Smith 000192/2852
Petitioner

APPENDIX "I"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	CR. NO. 89-1647
v.	COUNT I: BURGLARY IN THE FIRST DEGREE (§ 708-810(1)(c), H.R.S.)
JONATHAN K. KIPI, Defendant.	COUNTS II – IV: TERRORISTIC THREATENING IN THE SECOND DEGREE (§ 707-717(1), H.R.S)
	COMPLAINT
	1st CIRCUIT COURT STATE OF HAWAII FILED 1989 OCT 24 A 8:36
	B. NAKAMAEJO CLERK

COMPLAINT

The undersigned Deputy Prosecuting Attorney of the City and County of Honolulu, State of Hawaii charges:

COUNT I: On or about the 11th day of October, 1989, in the City and County of Honolulu, State of Hawaii, JONATHAN K. KIPI did intentionally enter and remain unlawfully in a building, to wit, the residence of Linda K. Yamasaki, situated at 3218 Frances Street, with intent to commit therein a crime against a person and property rights and did recklessly disregard the risk that the building was the dwelling of another, thereby committing the offense of Burglary in the First Degree in

violation of Section 708-810(1)(c) of the Hawaii Revised Statutes.

COUNT II: On or about the 11th day of October, 1989, in the City and County of Honolulu, State of Hawaii, JONATHAN K. KIPI threatened, by word or conduct, to cause bodily injury to Linda K. Yamasaki in reckless disregard of the risk of terrorizing said Linda K. Yamasaki, thereby committing the offense of Terroristic Threatening in the Second Degree in violation of Section 707-717(1) of the Hawaii Revised Statutes.

COUNT III: On or about the 11th day of October, 1989, in the City and County of Honolulu, State of Hawaii, JONATHAN K. KIPI threatened, by word or conduct, to cause bodily injury to Sergio Chaulet in reckless disregard of the risk of terrorizing said Sergio Chaulet, thereby committing the offense of Terroristic Threatening in the Second Degree in violation of Section 707-717(1) of the Hawaii Revised Statutes.

COUNT IV: On or about the 11th day of October, 1989, in the City and County of Honolulu, State of Hawaii, JONATHAN K. KIPI threatened, by word or conduct, to cause bodily injury to David F. Harris in reckless disregard of the risk of terrorizing said David F. Harris, thereby committing the offense of Terroristic Threatening in the Second Degree in violation of Section 707-717(1) of the Hawaii Revised Statutes.

Dated at Honolulu, Hawaii: October 19, 1989.

STATE OF HAWAII

By Keith M. Kaneshiro
Prosecuting Attorney

By /s/ Armina A. Ching
Deputy Prosecuting Attorney
City and County of Honolulu

Supreme Court, U.S.
FILED
SEP 5 1991
OFFICE OF THE CLERK

No. 91-222

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

RICHARD W. POLLACK
Public Defender
State of Hawaii

THEODORE Y.H. CHINN
Deputy Public Defender
State of Hawaii

LYNETTE MAH MATSUSHIMA*
Deputy Public Defender
State of Hawaii

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Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Hawaii Supreme Court properly applied *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), to hold that prosecution of defendant for substantive offenses was barred by double jeopardy where such offenses were based on the same conduct that led to defendant's prior criminal contempt conviction and sentence.

2. Whether the corollary to the *Grady* rule also bars the prosecution in the instant case.

3. Whether *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), should be affirmed when the instant case reaffirms the reasonableness of the *Grady* rule and amply demonstrates its necessity in prohibiting repeated attempts to prosecute defendants for identical conduct.

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State v. Kipi, 72 Haw. ___, 811 P.2d 815 (1991) 1, 8, 12, 15, 16

State v. White, 248 N.J. Super. 515, 591 A.2d 954 (1991) 18

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Hawaii Revised Statutes ("HRS") § 701-109 ..... *passim*

HRS § 707-717(1) 6

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HRS § 710-1077 5

No. 91-222

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF IN OPPOSITION

Respondent Jonathan K. Kipi ("Kipi") respectfully prays that the Court deny the petition for writ of certiorari to review the opinion and judgment on appeal of the Supreme Court of the State of Hawaii entered in the above-entitled proceeding on May 8, and 20, 1991.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Hawaii dated May 8, 1991, is reported in 72 Haw. ___, 811

P2d 815 (1991) and was reprinted in the Petition as Appendix ("App.") "A", therein.

The proceeding of the preliminary hearing on October 16, 1989, in the District Court of the First Circuit, Honolulu Division, State of Hawaii, for the offense of Burglary in the First Degree in the instant case and the District Court's oral ruling committing Kipi to Circuit Court for trial following the hearing is set forth in the original record in Cr. No. 89-1647 ("R.") at pages 78-98, which is reprinted at Appendix ("App.") "A", *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 701-109(1)(a), (2), (3), and (4)(a) of the Hawaii Revised Statutes (1985) provides that

> § 701-109 Method of prosecution when conduct establishes an element of more than one offense.
>
> (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. He may not, however, be convicted of more than one offense if:
>
> (a) One offense is included in the other, as defined in subsection (4) of this section.
>
> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate

prosecution officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

(a) It is established by proof of the same of less than all the facts required to establish the commission of the offense charged.

STATEMENT OF THE CASE

On July 24, 1989, Linda Yamasaki ("Yamasaki") filed an Ex Parte Petition for a Temporary Restraining Order for Protection against Kipi. R. at 69. The petition asked for the following: (1) that Kipi be enjoined from contacting, threatening, or abusing Yamasaki, her child and any other person residing with her; (2) that he be enjoined from telephoning Yamasaki; (3) that he be enjoined from entering or visiting her residence; and (4) that he be enjoined from contacting, threatening, or abusing her at work. *Id.*

On August 7, 1989, the Family Court granted Yamasaki's petition and a Temporary Restraining Order for Protection (TRO) was filed. R. at 72-74. On that same date, a Hearing to Show Cause as to why the TRO should not continue to be in effect was set for August 21, 1989. *Id.*

On August 21, 1989, following the Hearing to Show Cause on Yamasaki's petition, a Protective Order was issued by the Family Court, with one of the terms of the order as follows:

> Petitioner (Yamasaki) and Respondent (Kipi) are mutually enjoined and restrained from contacting, threatening or abusing each other and anyone living with the other party (including but not limited to their home or place of employment) and maliciously damaging the property of the other party.

Pet. App. at 27a-29a. The order was to remain in effect until February 17, 1990. Pet. App. at 27a.

Thereafter, on October 11, 1989, Yamasaki was asleep with her boyfriend Sergio Chaulet ("Chaulet") in her residence and was awakened at 4:00 a.m. when she heard mumbling in her bedroom. Br. Opp. App. at 3a-4a. She looked up and saw Kipi. *Id.* Kipi began yelling at Chaulet, asking him if he wanted to die. Br. Opp. App. at 5a. Kipi also told Yamasaki that if he ever saw her with anyone else, Kipi would kill that person. Br. Opp. App. at 5a.

David Harris ("Harris") was Yamasaki's roommate at her residence. Br. Opp. App. at 13a. Harris' girlfriend also resided there. *Id.* Apparently hearing the commotion, Harris went into Yamasaki's bedroom and told Kipi that

he would call the police if Kipi did not leave. Br. Opp. App. at 14a. Thereafter, Kipi, Chaulet, and Harris all went into the living room. Br. Opp. App. at 16a. When Harris attempted to use the telephone to call the police, Kipi took the phone away from Harris and threatened to use it on him. *Id.* Harris and Chaulet both left the house to call the police, leaving Kipi with Yamasaki and Harris' girlfriend. *Id.* Yamasaki told Kipi to leave and he left. *Id.*

The following day, on October 12, 1989, Police Officer Hyran Smith filed a Family Court Petition against Kipi alleging that on October 11, 1989, Kipi intentionally disobeyed the Protective Order thereby committing the offense of Criminal Contempt of Court in violation of HRS § 710-1077. Pet. App. at 39a-40a.

Five days following the incident, on October 16, 1989, prior to trial on the charge of contempt of court, a preliminary hearing was held at District Court of the first Circuit, Honolulu Division, charging Kipi with Burglary in the First Degree arising out of the identical incident of October 11, 1989. Br. Opp. App. at 1a-20a. Following the hearing, Kipi was bound over to Circuit Court for trial. Br. Opp. App. at 19a.

On October 24, 1989, a complaint was filed against Kipi in Circuit Court for the offense of Burglary in the First Degree, Count I, in violation of HRS § 708-810(1)(c), and, in addition, the complaint also charged Kipi with three counts of Terroristic Threatening in the Second

Degree[1], Counts II, III and IV, in violation of HRS § 707-717(1). Pet. App. at 41a-43a. On November 6, 1989, Kipi pleaded not guilty to the charges against him in the Circuit Court.

On December 7, 1989, the State, represented by Deputy Prosecuting Attorney Marcus Oshiro, was ready to proceed to trial in the Family Court on the Contempt charge against Kipi. Affidavit of Marcus Oshiro, which is reprinted as App. "B". All of the State witnesses were present including Linda Yamasaki, David Harris, and Sergio Chaulet, the complaining witnesses, and Rebecca Moore, David Harris' girlfriend. *Id.* Kipi moved for a change of plea and entered a plea of no contest. *Id.* The State did not object to the change of plea, but did ask for 5 months of incarceration due to the "egregious nature of the offense". *Id.* At the change of plea hearing, the State offered the following factual basis in support of the charge of contempt:

> a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki at her home on October 11, 1989, very early in the morning.
>
> b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the Defendant enter into her home.
>
> c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio (sic)

---

[1] Terroristic Threatening in the Second Degree is a misdemeanor which may be prosecuted by complaint without the necessity of a preliminary hearing. Rule 7(a) and (b), Hawaii Rules of Penal Procedure.

> Chaulet, and Ms. Rebecca Moore, all whom reside with Ms. Yamasaki.
>
> d. At the time of the violation, the Defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio (sic) Chaulet, and Mr. David Harris.

Br. Opp. App. at 22a. In addition, the State noted for the record that "additional criminal charges may be brought against the Defendant based upon his reading of the police report." Br. Opp. App. at 23a. The State has stipulated that Deputy Prosecuting Attorney Marcus Oshiro knew of the pending burglary charge and the terroristic threatening charges that had been filed in the Circuit Court. Pet. App. at 21a. Following the acceptance of the plea of no contest by the family court, Kipi was sentenced to 5 months incarceration. Pet. App. at 30a-32a.

On February 13, 1990, jury selection in Circuit Court began for the Burglary and Terroristic Threatening offenses. On February 15, 1990, the defense moved orally to dismiss the entire complaint based on double jeopardy and the compulsory joinder rule provided in HRS § 701-109. Pet. App. at 19a. At the hearing on the motion, the trial court agreed that Kipi was being retried for the same actions for which he was then serving five months' incarceration. Pet. App. at 24a-25a. The court recognized that although the contempt charge under Family Court was a separate charge, the court looked nevertheless to the underlying basis for the charges. *Id.* Accordingly, the court dismissed Counts I and II involving Linda Yamasaki with prejudice because the court believed that the family court order specifically dealt with Linda Yamasaki alone. *Id.*

However, the trial court denied the defense's motion to dismiss Counts III and IV, the Terroristic Threatening charges against Sergio Chaulet and David Harris, on the grounds that the court believed that these cases were separate offenses and outside the jurisdiction of the Family Court when that court adjudicated the contempt offense. Pet. App. at 25a.

The State appealed the dismissal of Counts I & II. The Hawaii Supreme Court held that the compulsory joinder rule provided in HRS § 701-109(2) apply to contempt charges and that a contempt charge must therefore be tried with any other offense arising from the same conduct. Pet. App. at 7a-8a. However, an exception to the compulsory joinder rule is applicable in this case because the contempt offense and the substantive offenses could not have been tried within the jurisdiction of a single court. Pet. App. at 8a. But, the Hawaii Supreme Court held that the *Grady* rule applies and therefore double jeopardy barred the subsequent prosecution for the offenses of burglary and terroristic threatening. Pet. App. at 9a-15a. Accordingly, the Hawaii Court affirmed the dismissal of Counts I and II and, in addition, directed that Counts III & IV also be dismissed. Pet. App. at 16a.

REASONS FOR DENYING THE WRIT

In the Petition for Writ of Certiorari, the State of Hawaii (hereinafter "State") stretches the holding in *Grady v. Corbin*, 495 U.S. ___, 109 L.Ed.2d 548 (1990), beyond the clear language enunciated, in order to seek the reversal of the decision by the Hawaii Supreme Court in *State v. Kipi*,

71 Haw. ___, 811 P.2d 815 (1991). Asserting that the Hawaii court was confused by the *Grady* rule, the State attacks the Hawaii Supreme Court, saying that the Hawaii Court "flouted" the entire rationale and structure of *Grady* and that there could be "no reasoned claim" that the Hawaii Court kept within *Grady*'s own logic. Pet. at 10. In addition, the State seeks to overturn the *Grady* rule, asserting that it suffers from "doctrinal weakness" and contains practical problems. *Id.*

Kipi submits that under the facts of this case, the Hawaii Supreme Court correctly applied the *Grady* rule. Moreover, the facts of this case reaffirm the reasonableness of the *Grady* rule and amply demonstrate its necessity in prohibiting repeated attempts to prosecute defendants for identical conduct.

I. The Hawaii Supreme Court properly applied the *Grady* rule.

In its criticism of the Hawaii Supreme Court, the State ignores the plain and obvious language of the *Grady* rule, that double jeopardy bars a subsequent prosecution if the State,

> to establish an essential element of an offense charged in that prosecution, will *prove conduct that constitutes an offense* for which the defendant has already been prosecuted.

Grady, 109 L.Ed.2d at 564 (emphasis added). Instead of the above rule, the State contends that *Grady* established the following rule:

> The majority decision in *Grady* limited its expansive holding to bar only those subsequent prosecutions in which the government, to establish an essential element of an offense charged in that prosecution, will prove the *entire* conduct constituting *all the elements* of the offense for which he had already been prosecuted.

Pet. at 11 (emphasis original). The State extrapolated this distorted interpretation by citing to the language in *Grady*, where it was applying the facts of the case to the newly-enunciated rule, which found that reprosecution of Corbin would result in proof of the "entirety of the conduct for which Corbin was convicted". 109 L.Ed.2d at 565-566. In addition, the State cited to the language in *Grady* which held that the bar of double jeopardy would be equally applicable to a "component offense":

> (I)f in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense.

Id. at 564 n. 11. Reading all of the cited language together, the State argues that the rule should be as quoted above. Moreover, the State further misinterprets the *Grady* rule by arguing that,

> Because the State will therefore not prove all elements of the criminal contempt offense, the Hawaii Supreme Court's holding that the prosecution of the terroristic threatening charges is barred by *Grady* is plainly in error.

Pet. at 13 (footnote omitted). This statement by the State shows that it believes that *conduct* is not the focus in *Grady*, but instead the test is whether or not the prosecution of the subsequent offense will prove "all elements" of the prior offense.

The *Grady* rule cannot be as the State contends. If it is, then the prior offense would merely be a lesser-included offense of the subsequent offense, since all the elements of the prior offense must be proved in the subsequent offense. Indeed, it would be no different than the *Blockburger* test since under the State rule, "proof of the entire conduct constituting all the elements of the offense for which the defendant had already been prosecuted" is equivalent to the *Blockburger* rule which bars reprosecution if "each statute does not 'require proof of a fact which the other does not' ". But the *Grady* rule was established because "a subsequent prosecution must do more than merely survive the *Blockburger* test." 109 L.Ed.2d at 564.

The *Grady* rule states that double jeopardy bars a subsequent prosecution if the State,

> to establish an essential element of an offense charged in that prosecution, will *prove conduct that constitutes an offense* for which the defendant has already been prosecuted.

109 L.Ed.2d at 564. The focus of the rule is on conduct, not the elements of the prior offense. It is conduct that constitutes an offense, not conduct that constitutes all of the elements of the offense. Here, conduct on the part of Kipi that constitutes the offense of contempt was his act of entering Yamasaki's residence and threatening her and

her two housemates. That is the entirety of Kipi's conduct on the night of the incident. It is the identical conduct which was to be used by the State in the burglary and terroristic threatening offenses. Clearly, the Hawaii Supreme Court was correct in its decision.

II. The *Grady* corollary also supports the decision of the Hawaii Supreme Court.

Moreover, *Grady* also held that double jeopardy bars subsequent prosecution of the "component offense":

> Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the *conduct comprising all of the elements of another offense not yet prosecuted* (a "component offense"), the Double Jeopardy Clause would bar subsequent prosecution of the component offense.

Grady, 109 L.Ed.2d at 564, n. 11 (emphasis added). Kipi concurs with the State that the Hawaii Court did not reach this corollary to the rule in *Grady*. *See* Pet. at 13 n. 5. Nevertheless, Kipi submits that had the Hawaii Court reached this issue, the holding in *Kipi* would be the same.

The facts in this case clearly fit *Grady's* corollary. The conduct which the State used to secure the contempt conviction and the resulting 5 months jail sentence, was the same conduct which comprised all of the elements of the offense of Burglary in the First Degree and Terroristic Threatening in the Second Degree. The Hawaii Court observed that "Kipi's entering of Yamasaki's house and his threats to her and two of her housemates was the exact conduct that constituted the offense of contempt

with respect to the family court's protective order". Pet. App. at 12a. The State similarly observed that the conduct proved at the contempt prosecution was that "Kipi entered Yamasaki's home, awakened her and her housemates, and threatened Yamasaki, Chaulet, and Harris." Pet. at 14 n. 5.

Nevertheless, the State argues that judgment could not be affirmed under the *Grady* corollary because the "State would clearly not have to establish in its criminal contempt case all of the elements of the burglary charge." Pet. at 14 n. 5. The State further argues that "(s)pecifically, the State would not have to establish that Kipi entered Yamasaki's home 'with the intent to commit therein a crime' ", an essential element to the charge of Burglary in the First Degree. *Id.* This is so because the "State was merely going to prove that Kipi entered Yamasaki's home, awakened her and her housemates, and threatened Yamasaki, Chaulet, and Harris." *Id.*

Although the State is logically correct in the above quoted statements, *Grady's* corollary states a different test. It bars subsequent prosecution where in the prior prosecution the State "necesarily has proved the *conduct* comprising all of the elements" of the offense charged in the subsequent prosecution. 109 L.Ed.2d at 564 n. 11. The key focus is the *conduct* which was proved, rather than the elements of the offense. The corollary did not state that "the State necessarily has proved all of the elements of another offense". Instead, it is whether "the State necessarily has proved the conduct comprising all of the elements of another offense". *Id.* The State's argument is in essence the *Blockburger* test. But *Grady* sets forth a test in addition to the *Blockburger* test.

Further, there are a number of ways in which the State may prove "intent to commit therein a crime". The proof varies with the facts of each case. In this case, the State would have used the fact that Kipi threatened Yamasaki, Chaulet and Harris to establish that Kipi entered Yamasaki's residence with the "intent to commit therein a crime". The preliminary hearing on the Burglary charge supports this. Br. Opp. App. "B".

The State elected to use these threats in the prosecution of Kipi for the contempt offense. The State used this conduct to establish that Kipi violated the Protective Order which had enjoined Kipi "from contacting, threatening or abusing (Yamasaki) and anyone living with the other party". Pet. App. at 28a. Indeed, the prosecutor relied upon the same conduct again when he asked the Family Court to impose "five months of incarceration . . . upon the Defendant due to the egregious nature of the offense". The trial court in the instant case found that,

> THE COURT: . . .
>
> And it is clear to the Court that this defendant is being retried in this case for the same actions for which he is currently serving five months incarceration as previously ordered by Judge William Smith in the family court proceeding.
>
> . . .
>
> And it's clear from all that's been presented to the Court by the prosecution in this case that Judge Smith (Family Court judge) considered all of defendant's actions, the actions in threatening

> the housemates, the actions in threatening Ms. Yamasaki, and the breaking in. And as a result of that, sentenced this defendant to five months in jail.

Pet. App. at 24a. The trial court recognized that the State would have used the identical conduct to prove the instant case that was used in the prosecution for the contempt offense. The State failed to show that there were "two separate offenses". *Grady*, 109 L.Ed.2d at 565 n. 14. Thus, the State "in the course of securing a conviction for" the offense of contempt, "necessarily has proved the conduct comprising all of the elements of" Burglary in the First Degree.

Similarly, by presenting proof that Kipi had threatened Yamasaki, Chaulet and Harris in support of the violation of the Protective Order, the State "necessarily has proved the *conduct* comprising all of the elements of" the three charges of Terroristic Threatening in the Second Degree.

III. The instant case reaffirms the reasonableness of the *Grady* rule and amply demonstrates its necessity in prohibiting repeated attempts to prosecute defendants for the identical conduct.

The State argues for the overruling of *Grady* saying that the decision in *Kipi* demonstrates that the rule "easiiy disintegrates into the general 'single transaction' test that has long been condemned by this Court's Double Jeopardy jurisprudence, and which is condemned even in *Grady* itself". Pet. at 17-18 (footnote omitted) (citation omitted). The State states that "as the Supreme Court of

Hawaii could not help but observe, "what the new double jeopardy test in effect requires is that prosecutors observe a rule previously rejected by the Supreme Court 'that all charges arising out of a single occurence must be joined in a single indictment' ". Pet. at 18 (citation omitted).

In the context of the *Kipi* decision and the statutory provision in Hawaii requiring compulsory joinder, the Hawaii Supreme Court's observation is correct. The observation made by the Hawaii Supreme Court in *Kipi*, requiring joinder of all charges arising out of a single occurence, must be construed in light of HRS § 701-109(2), the compulsory joinder rule. The Hawaii Court held that, under the compulsory joinder rule, the contempt charge must be tried together with other offenses arising from the same conduct. However, the Hawaii Court also held that because Family Court had exclusive original jurisdiction over the contempt charge and did not have jurisdiction over the substantive charges, the statutory exception to the compulsory joinder rule applied. But with the existence of the *Grady* decision, this exception is now subject to constitutional challenge.

The Hawaii Supreme Court, mindful of the compulsory joinder rule in Hawaii, then made the observation that all charges from a single occurence must be in a single indictment. This was but a reminder to the prosecution to ensure that all charges arising out of a single occurrence be joined in the same indictment, lest they be subject not only to scrutiny under the compulsory joinder rule but also to the double jeopardy bar under the *Grady* rule.

Moreover, the facts in this case do not present a situation where it could be said that the "same transaction" test was applied. The State in this case elected to prosecute Kipi for the contempt by presenting evidence that he entered Yamasaki's residence, awakened her and threatened her and her housemates. Not only did the State present the sum total of Kipi's conduct in the contempt prosecution, it also asked of the Family Court that Kipi be given a harsher sentence "based on the egregious nature of the offense". It elected to separately prosecute Kipi knowing that there were pending burglary and terroristic threatening charges and aware that consolidation of all charges including the contempt charge may be achieved by waiver.

The Superior Court of New Jersey made the following observation in a similar case involving a prior prosecution for contempt of court and a subsequent prosecution for assault:

> One final comment deserves attention before leaving the subject. We have thoroughly reviewed the transcript of the first trial. Our exhaustive examination of the record clearly discloses that the sole factual issue before the jury was whether defendant committed an assault and battery on Hardell. In an abstract sense, it is possible that the jury acquitted defendant for reasons other than its disbelief that he physically attacked the job supervisor. For example, it is conceivable that the jury found defendant was not aware of the court order, or that the attack upon Hardell did not interfere with the rights of workers to enter the job site. We are convinced from our reading of the transcript, however, that

> these were not seriously contested factual issues. In short, the gist of the contempt charge was that defendant physically attacked Hardell. The jury was not satisfied that the prosecutor's proofs established that offense beyond a reasonable doubt. Putting aside technical concepts of double jeopardy, it is plain to us that defendant was tried and acquitted of the "same offense" for which he is now being prosecuted. This is unfair and contrary to the design of the federal and state Constitutions.

State v. White, 248 N.J. Super. 515, 591 A.2d 954, 958-959 (1991). Similarly, as the facts in this case shows, Kipi is being prosecuted for the identical conduct for which he was previously prosecuted and sentenced to 5 months in jail for the "egregious nature of the offense".

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Dated: Honolulu, Hawaii, September 5, 1991.

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EXHIBIT D

IN THE DISTRICT COURT
OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII vs. JONATHAN K. KIPI, Defendant.	VIOLATION OF SECTION 708-810(1)(C) H.R.S. REPORT NO. 89349303 CASE NO. 3P of 10/16/89

TRANSCRIPT

of proceedings had in the above-entitled matter on the 16th day of October, 1989, before the HONORABLE BAMBI E. WEIL, Judge, Presiding.

APPEARANCES:

Attorney for the State	BARBARA ANN T. KONNO Deputy Prosecuting Attorney 1164 Bishop Street Honolulu, Hawaii 96813
Attorney for Defendant	JACK TONAKI Deputy Public Defender 1130 N. Nimitz Hwy., #A-135 Honolulu, Hawaii 96817

TRANSCRIBED FROM TAPE BY:

CYNTHIA TANDO
Official Court Reporter
District Court of the
First Circuit
State of Hawaii

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[p. 3] MONDAY, OCTOBER 16, 1989 Afternoon Session

MS. KONNO: Good afternoon again, Your Honor. Barbara Ann. T. Konno, deputy prosecuting attorney, appearing on behalf of the State.

THE COURT: Good afternoon again to you.

MS. KONNO: This is case 3P on the calendar.

MR. TONAKI: Good afternoon, Your Honor. Jack Tonaki on behalf of Jonathan Kipi. And Mr. Kipi is present.

THE COURT: Good afternoon to you. And is the defense ready to proceed?

MR. TONAKI: We are.

THE COURT: The State ready?

MS. KONNO: Yes, Your Honor.

THE COURT: You may proceed, Ms. Konno.

MS. KONNO: Thank you. My first witness is Linda Yamasaki.

LINDA YAMASAKI,

called as a witness by the Prosecution, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KONNO:

Q Please state your name.

A Linda (unintelligible) Yamasaki.

[p. 4] Q And where were you living on October 11th, 1989?

A 3218 Francis Street.

Q Is that in Kapahulu?

A Yes.

Q On that date at about 4:00 a.m. did you learn that your house had been entered?

A Yes.

Q How did you learn that?

A I was – I was asleep when I looked up and I saw my ex-boyfriend Jonathan K. Kipi.

Q Okay. How – and how – how were you woken up?

A I heard mumbling, and then I looked up and there he was.

Q Okay. And if you were to see Jonathan Kipi again could you recognize him?

A Yes.

Q Is he present in the courtroom today?

A Yes.

Q Can you please point him out and describe what he's wearing.

A White t-shirt, green – dark green cover.

Q Is he sitting at the end of this table?

A Yes.

MS. KONNO: Your Honor, may the record [p. 5] reflect that the witness has identified the defendant?

THE COURT: Yes.

BY MS. KONNO:

Q Now, Miss Yamasaki, when you heard the mumbling and woke up, what happened?

A He started to yell and talk loud.

Q Okay. And what was he yelling?

A I couldn't really understand. All he told – I was up, and then he said to Sergio to get up.

Q Okay. And who is Sergio?

A My boyfriend now.

Q Okay. And was Sergio in the bedroom sleeping with you?

A Mm-hmm. He told him to get up and let's go outside right now.

Q All right. And did he continue yelling at Sergio?

A Mm-hmm.

Q What else did he say to Sergio?

A If he wanted to die.

Q All right. And tell me every – what else did he say?

A He told me if he ever saw me with anyone else that he would kill that person.

Q Okay. When he said that to you, were you [p. 6] afraid?

A Yes, 'cuz I couldn't – I was in shock. I don't know what to do. I thought he was going to kill him.

Q And when you say "him," you mean Sergio?

A Sergio, yes.

Q Do you know how the defendant entered your house?

A No. All I know is after I – I went out and the door is wide open.

Q All right. Did the defendant – did he have keys to your residence?

A He wasn't supposed to.

Q Could the front door have been unlocked?

A Possibly –

MR. TONAKI: Objection. Calls for speculation, Your Honor.

THE COURT: It's already been answered. So the record will stand.

BY MS. KONNO:

Q Did you – did you see any signs of forced entry into your house, Miss Yamasaki?

A No.

Q Okay. How long have you know the defendant Jonathan Kipi?

A [p. 7] Around four years.

Q And when you saw him on October 11th, 1989, did he have permission to enter your dwelling and to threaten you and your boyfriend?

A No.

Q Did all of this occur in the City and County of Honolulu, State of Hawaii?

A Yes.

MS. KONNO: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. TONAKI:

Q Miss Yamasaki, are you still married to Mr. Kipi?

A We was never married.

Q Okay. He was your boyfriend at one time?

A Mm-hmm.

Q Is that right?

A Yes.

Q Okay. And do you have any children?

A One.

Q This was a boy or girl?

A A girl.

Q All right. And your daughter is – your daughter's father is Mr. Kipi; is that right?

[p. 8] A Mm-hmm. Yes.

Q Does your daughter live with you?

A Yes. She lives with me and she stays with my mother.

Q Now, this house on Francis Street, do you own that house?

A Mm-hmm. Yes.

Q And before – or – or while you were living with Mr. Kipi, did Mr. Kipi also live in that house?

A Yes.

Q Okay. How long did you and Mr. Kipi live there together?

A Three years. Little over three years.

Q And when did you and Mr. Kipi separate or break up?

A On July 11th.

Q Of this year?

A Mm-hmm.

Q 1989. After Mr. Kipi and yourself had broken up, had he ever been back to the house on Francis Street?

A A lot of times. Once he broke in.

Q About how many times had he been back to the house after you had broke up?

A Legally or any –

Q Legally or illegally.

[p. 9] A Probably around 10 times.

Q You said that he had broken in at least one time before?

A Mm-hmm.

Q How did – how had he gotten into the house?

A Through the window.

Q Did he cut the screen or broke the window?

A No, he – it used to be just hooked on. So he took off the hook and he pushed – pushed the jalousie up.

Q Had he tried to enter into – enter through the regular doorway?

A I'm not sure because I wasn't living at home. My friend saw him in the house and she called the police. By the time they came he was (unintelligible).

Q Now, you said after you had broken up he had been to the house about 10 times – you said legally or illegally.

A Mm-hmm.

Q Where there times that he came to the house with your permission?

A To drop off my daughter.

Q So he would continue to see your daughter?

A Mm-hmm. Not right after we broke up.

Q But in between October 11th and the time you [p. 10] had broken up, he had seen your daughter on occasion; is that right?

MS. KONNO: Objection, Your Honor. I believe that's the wrong date.

THE COURT: Mr. Tonaki, do you wish to rephrase or withdraw?

MR. TONAKI: All right.

BY MR. TONAKI:

Q Between the time that you had broken up and the time that you had noticed Mr. Kipi mumbling in your room, he had on occasion visited your daughter; is that right?

MS. KONNO: I'm going to object on the basis of relevance for purposes of this hearing, Your Honor.

MR. TONAKI: Your Honor, I think it – it goes to the burglary in this case and whether or not the – there was an illegal remaining on the premises.

THE COURT: Overruled. You may answer.

THE WITNESS: Could you repeat the question?

BY MR. TONAKI:

Q Between the time that he was in your room on this night and the time that you had broken up, he had on occasion visited your daughter; correct?

A He would call first and then he would come [p. 11] over, or he would pick her up and then bring her back.

Q When he would bring her back, would he come into the house?

A I wouldn't let him come in the house. He made excuses to come into the house.

Q And by excuses what do you mean?

A Like "I have to use the bathroom."

Q Okay. And would he do anything to you while he was in the house?

A He wouldn't want to leave.

Q Did Mr. Kipi want to get back together with you?

A Yes.

Q And he to told you that on several occasions?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Sustained.

BY MR. TONAKI:

Q You said that Jonathan Kipi wasn't supposed to have the keys; is that right?

A Yes.

Q While you were living together in the house, did he have keys to the house?

A Yes.

MS. KONNO: Objection –

[p. 12] THE COURT: I'm sorry. The question has already been answered. However, Miss Yamasaki, when you see the – any attorney on their feet, please do not answer the question until the Court has heard what the objection is the ruled upon it.

THE WITNESS: Okay.

THE COURT: You understand?

THE WITNESS: Mm-hmm.

THE COURT: Very well. You may proceed, Mr. Tonaki.

BY MR. TONAKI:

Q While Mr. Kipi was living with you in the house, did – did he have keys to the house?

MS. KONNO: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

MR. TONAKI: I – I didn't hear the answer for that question, Your Honor.

THE COURT: Let's go off the record.

(Off-the-record discussion.)

THE COURT: Court –

MR. TONAKI: I would ask the Court's excuse, Your Honor, but counsel was objecting at that time so I didn't really hear the witness' answer to that question.

[p. 13] THE COURT: It's all right. The Court overruled itself and will allow the witness to answer. Do you know what the question is that's pending now?

THE WITNESS: Did he have a set of keys to my house.

THE COURT: At what time, Mr. Tonaki?

THE WITNESS: When he was living –

BY MR. TONAKI:

Q When you – when you were living together.

A We only had one key. He was supposed to – he said he lost his key.

Q Did you make a copy of the keys for him?

A No.

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Well, the question has been answered again.

THE WITNESS: I'm sorry. I'm sorry.

THE COURT: You need to wait if you could.

THE WITNESS: Okay.

THE COURT: Try it one more time, Mr. Tonaki.

BY MR. TONAKI:

Q Now, on this night when you – when you saw Mr. Kipi in your room, and this is I believe the night of the [p. 14] 11th or the night of the 12th, you said that you didn't notice anything unusual about your apartment as far as how he got into the apartment; is that correct?

A Yes.

Q Had you locked the door that evening, the front door to this house?

A My roommate was the last to – well, he had friends over, so they left.

Q Is this Sergio?

A No. My roommate David.

Q How many other people besides yourself and David live in the house?

A His girlfriend.

Q So there – there are three people who live in the house; is that right?

A Mm-hmm.

Q Yourself, David and David's girlfriend?

A Mm-hmm.

Q Do David and his girlfriend know Jonathan Kipi?

A Yes.

Q And when you woke up, when you saw Mr. Kipi in your room, did you notice at that point where the other two residents of the house were?

A Yes.

Q Where were they?

[p. 15] A In their bedroom.

Q Were they awake or were they sleeping?

A Well, they awoke when they heard the noise.

Q Where – where is the first point at which you noticed the other two residents of the house?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Overruled. You may answer.

THE WITNESS: When my roommate David came into my room and said that he was going to call the police if Jonathan didn't leave.

BY MR. TONAKI:

Q So is this while – while Jonathan was arguing with Sergio?

A Yes.

Q Now, are David and the girlfriend friends of Jonathan?

MS. KONNO: Objection. Irrelevant, Your Honor.

THE COURT: Mr. Tonaki?

MR. TONAKI: Your Honor, it may go toward the – as far as permission for being in the house of the unlawful remaining in the house. I think we have to know what relationship these other residents of the house had to the defendant.

[p. 16] MS. KONNO: Not for purposes of this probable cause hearing, Your Honor.

THE COURT: Well, it's true, don't you agree, that in *Toledo versus Lam* the defense can bring evidence of a defense in the preliminary hearing, and I am obligated to hear it, including that they can bring witnesses for that purpose.

So, given the offer of proof, the objection's overruled. You may answer the question.

THE WITNESS: No, they are not friends of Jonathan Kipi.

BY MR. TONAKI:

Q Do they know Jonathan?

A Yes.

Q When you first awoke and you saw Jonathan mumbling above your bed, could you at that point tell if anybody else was awake in the house?

A No.

Q When Jonathan was in your room, was the door to your bedroom open?

A Yes.

Q And were the lights on outside of your bedroom? Could you tell?

A No.

Q Was the – the house dark then?

[p. 17] A No, 'cuz the street lights shine in my room.

Q But as far as lamps or ceiling lights in the house, no other lights were on in the house; is that right?

A Yes.

Q When Jonathan started arguing with Sergio, did Sergio argue back or fight back?

A No.

Q Did Jonathan touch Sergio or touch you?

A No.

Q After this argument with Sergio, what did Jonathan do?

A Well, he told Sergio to go outside. So they left. And they left me in the room. David – they all – David, Jonathan and Sergio were in the living room.

When David tried to call the police, Jonathan tried to take the phone away from him. Well, he took the phone away from him and he was going to use it on David.

So they left – David and Sergio left to go and call the police, and left me and Rebecca, David's girlfriend, with Jonathan.

So when I tried to call the police, he started walking towards me. The receiver of the phone pulled out. And I yelled at him and I said "You better leave." So he left. After he left the police arrove (sic) [p. 18] within seconds.

Q Now, when you say that he was going to hit Sergio with the –

A Not Sergio.

Q Hit David with the – the phone receiver, what makes you say that?

A I heard him threatening David.

Q Did he swing the receiver at David?

A No. I heard him saying "I'm going to kill you. Who are you? You don't – this is – everything in this house is mine."

Q What was David saying to Jonathan?

A Nothing. What can you say?

Q And you said Sergio and David went to – or left the apartment; is that right?

A Yes. Not apartment, house.

Q I'm sorry. Sergio and David left the house.

THE COURT: Excuse me. Miss Yamasaki, do you need a recess to compose yourself? Let's go off the record a minute.

(Off-the-record discussion.)

BY MR. TONAKI:

Q Ms. Yamasaki, I don't have that much more. Okay. So, are you okay?

A Yes.

[p. 19] Q Do you want to take a break? Okay, I don't have too many – that much – too many more questions. Now –

THE COURT: You may continue.

MR. TONAKI: Thank you.

BY MR. TONAKI:

Q And you said that David and Sergio went to call the police; is that right?

A Yes.

Q How did you know that they were going to call the police?

A Because Johnny – Jonathan wouldn't let them use the phone.

Q So did they say that they were going –

A No, 'cuz they were afraid that he wouldn't let them use the phone. They were afraid that he would have done something.

Q So –

A They just left.

Q So David and Sergio just left the house then?

A Yes.

Q They didn't say where they were going; is that right?

A Yes.

Q And they left – when David and Sergio left the [p. 20] house, they left you and David's wife with Jonathan; is that right?

A His girlfriend. Yes.

MR. TONAKI: No further questions.

THE COURT: Any redirect?

MS. KONNO: No questions, Your Honor.

THE COURT: Thank you, Miss Yamasaki.

THE WITNESS: Thank you.

THE COURT: You may step down.

(Witness excused)

THE COURT: Anything further from the State?

MS. KONNO: No, Your Honor. The State rests at this time.

THE COURT: Any evidence from you Mr. Tonaki?

MR. TONAKI: No evidence for the defendant.

THE COURT: Does counsel submit?

MR. TONAKI: Yes.

MS. KONNO: Yes, Your Honor.

THE COURT: The Court finds there's probable cause to believe that Jonathan K. Kipi committed the offense of Burglary in the First Degree in violation of Section 708-810 Subsection (1) Subsection lower case [p. 21] (c) of Hawaii Revised Statutes and commits this matter to the Circuit Court.

The Court has before it a pretrial bail report. Do you wish to address yourself to that, Mr. Tonaki?

MR. TONAKI: Your Honor, we would simply ask at this point – there doesn't appear to be a sponsor that has been pre-screened by the Intake Service Center, but we would ask the Court to consider a bail reduction to the amount of a thousand dollars.

THE COURT: Any objection to that?

MS. KONNO: Yes, Your Honor.

THE COURT: The objection is sustained. Motion is denied.

(Whereupon, the proceedings concluded on October 16, 1989.)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII)	CR. NO. 89-1647
)	
v.)	COUNT I:
JONATHAN K. KIPI,)	BURGLARY IN THE FIRST
Defendant.)	DEGREE
)	COUNTS II – IV:
)	TERRORISTIC THREATENING
)	IN THE SECOND DEGREE
)	
)	AFFIDAVIT OF MARCUS
)	OSHIRO

AFFIDAVIT

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

MARCUS OSHIRO, being first duly sworn, on oath deposes and says that:

1. Affiant was the Deputy Prosecuting Attorney, representing the State on December 7, 1989, 8:30 a.m., in State of Hawaii v. Jonathan Kineola Kipi, FC-Cr. 89-3049.

2. Defendant was represented by Deputy Public Defender Sheila Lippolt, and the Honorable William Smith presided that morning.

3. Affiant recalls that the State was ready and able to proceed to trial on the Contempt of Court charge that arose out of an alleged violation of a Protective Order, issued by Judge Albert Gould on August 21, 1989.

4. Affiant recalls that the Petitioner in the above Protective Order, Ms. Linda Yamasaki, was present in court and willing to testify that Defendant did violate the Protective Order on October 10, 1989.

5. Affiant recalls that other State witnesses, Mr. David Harris, Mr. Serio Chaulet, and Ms. Rebecca Moore, were also present in court and willing to testify that Defendant did enter onto the residence of Ms. Linda Yamasaki.

6. Affiant recalls that he did not object to the No Contest Plea, but asked that five months of incarceration be imposed upon the Defendant due to the egregious nature of the offense.

7. Affiant recalls that in responding to the Court's request for particular facts constituting the Protective Order violation, stated that:

a. The violation of the Protective Order did arise out of an incident in which Defendant did contact Petitioner, Ms. Linda Yamasaki at her home on October 11, 1989, very early in the morning.

b. Ms. Linda Yamasaki was asleep at the time and awoke upon hearing the defendant enter into her home.

c. Also awakened by Defendant's entrance into the home were Mr. David Harris, Mr. Serio Chaulet, and Ms. Rebecca Moore, all whom reside with Ms. Yamasaki.

d. At the time of the violation, the defendant did make verbal threats to Ms. Linda Yamasaki, Mr. Serio Chaulet, and Mr. David Harris.

8. Affiant did note on the record that it was his belief that additional criminal charges may be brought against the Defendant based upon his reading of the police report.

Further affiant sayeth naught.

/s/ Marcus Oshiro
MARCUS OSHIRO

Subscribed and sworn to before me
this 15th day of February, 1990.

/s/ _____
Notary Public, State of Hawaii

My commission expires: 4/14/90

Supreme Court, U.S.
FILED
SEP 20 1991
OFFICE OF THE CLERK

No. 91-222

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY MEMORANDUM

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STATE OF HAWAII,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY MEMORANDUM

I. ARGUMENT

A. Respondent's Characterization of *Grady v. Corbin* and the Judgment Below Demonstrates that, on its own Terms, *Grady* was Misapplied, and that Review Should Be Granted.

Respondent's principal reason why review should be denied as to Hawaii's initial claim that the judgment below conflicts on its face with *Grady v. Corbin*, 110 S. Ct. 2084 (1990), rests upon a basic misreading of the Petition. Respondent claims that the State has wrongly read into *Grady* a test for Double Jeopardy claim preclusion set forth in *Blockburger v. United States*, 284 U.S. 299 (1932).

See Resp. Br. at 11, 13. It is obvious that this argument, comprising the heart of the Brief in Opposition, erects a straw man. Petitioner never disputes that the traditional and textually-founded (so far as the Double Jeopardy clause is concerned) *Blockburger* analysis was rejected in *Grady*. *See* Pet. at 4 & n.1, 9-10, 12-15. Indeed, that is a main reason why Petitioner argues, ultimately, that this Court should, if it needs to do so to reverse, reconsider and overrule *Grady* in its entirety. *See id.* at 10-11, 15-21.

Our first point is that the Supreme Court of Hawaii misapplied *Grady*. It is Respondent who misstates the *Grady* rule. Hawaii's claim that *Grady* bars "only those subsequent prosecutions in which the government, to establish an essential element of an offense charged in that prosecution, will prove the entire conduct constituting all the elements of the offense for which he had already been prosecuted" (Pet. at 11) derives from the plain language of *Grady* itself. *See* 110 S. Ct. at 2093 (prosecution barred where government will prove "conduct that constitutes an offense" already tried); *id.* at 2093 n.11 (in converse case, subsequent prosecution barred if in securing initial conviction State has necessarily proved conduct "comprising all of the elements of another offense" not yet prosecuted); *id.* at 2094 (prosecution barred where government will prove "entirety of the conduct that constitutes an offense" already tried). *See also Grady*, 110 S. Ct. at 2103 (Scalia, J., dissenting). *Blockburger*, of course, looks only to the statutory elements involved in the two prosecutions, and not at all to the facts and evidence the prosecution actually intends to present. The Petition does not confuse *Grady* with *Blockburger*. The point of the Petition is that *Grady*, which

abandoned *Blockburger*, by no means leaves the lower courts free to utilize the "same transaction" test; Respondent's brief does not address this claim.

As the Petition proves (Pet. at 12-13 & n.5), the proposed prosecution struck down by the Hawaii courts survives *Grady*, and ought to have been allowed over any Double Jeopardy claim. Respondent quotes the operative language from *Grady* – namely that a later prosecution is barred only if the State "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted" – but then simply fails to apply that language faithfully. *See* Resp. Br. at 11. Thus, Respondent argues that "conduct on the part of Kipi that constitutes the offense of contempt was his act of entering Yamasaki's residence and threatening her and her two housemates." *Id.* at 11-12. This is simply untrue. Such conduct does not constitute a contempt until and unless the other elements, i.e., the existence of a court order; Kipi's knowledge of that order barring him from threatening or otherwise contacting Yamasaki; and Kipi's intentional breach of the order, are proved. Pet. at 12.

Similarly, Respondent is plainly wrong in attempting to prove that the subsequent prosecution fails under the *Grady* corollary. Respondent asserts that, here, " 'the State necessarily has proved the conduct comprising all of the elements of another offense' " (Resp. Br. at 13), but this is just not so. Burglary and terroristic threatening contain elements quite distinct from, and absent in, a prosecution for contempt, and the State's *proof* in the case on review here would have so reflected. *Grady* does not bar such a

prosecution, and this Court should grant the writ here and reverse the judgment.

B. Respondent's Argument Demonstrates More Clearly Than Ever that, if Reversal is Not Counseled By *Grady* Alone, Review Should Be Granted so That *Grady* May Be Reconsidered.

Respondent's own substantial recasting of *Grady* shows that Petitioner is right in urging that the practical and theoretical difficulties in applying and understanding the *Grady* test, combined with the weak historical and doctrinal foundation for it, warrant this Court's reconsideration of the *Grady* rule. Indeed, apart from offering affirmative proof why *Grady* should be revisited, Respondent simply has no answer to the reasons why it is appropriate to reconsider *Grady*. *See* Pet. at 15-17 (quoting *Payne v. Tennessee*, 111 S. Ct. 2597, 2617-18 (1991)).

Respondent virtually concedes that the Supreme Court of Hawaii collapsed the *Grady* rule into the "same transaction" test (*see* Resp. Br. at 15-16), yet seeks to argue that this impermissible expansion of Double Jeopardy protections is justified in light of a state compulsory joinder rule. This argument, however, is factually unfounded and logically untenable. The Hawaii Supreme Court expressly found that joinder was not required by Hawaii law (*see* Pet. App. 8a), and whether such joinder was required or not is wholly irrelevant to whether the Double Jeopardy Clause has any preclusive effect.

Respondent's citation to *State v. White*, 248 N.J. Super. 515, 591 A.2d 954 (1991), only further demonstrates why the petition should be granted. *White* stands for nothing

more than the principle of *issue* preclusion adopted by *Ashe v. Swenson*, 397 U.S. 436 (1970), with which the State has no quarrel. *See* Pet. at 20. Neither *Ashe*, nor *White* have anything to do with this case, where Respondent relies on a novel theory of federally mandated merger and bar to block a criminal prosecution.

Petitioner's request for revisiting *Grady* is appropriate, and the Court should grant certiorari for this added reason.

II. CONCLUSION.

For the reasons above and in the Petition, the Court should grant the writ, and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case for briefing and argument, and thereupon, reverse the judgment entered below.

Dated: Honolulu, Hawaii, September 20, 1991.

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